Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THOMAS A. BATTAGLIA,
Petitioner,

v.

UNION COUNTY WELFARE BOARD, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTION PRESENTED FOR REVIEW

Is political allegiance to the county political party chairman an "appropriate requirement," under *Branti v. Finkel,* for the "effective performance" of a part time legal assistant to the county welfare board?

PARTIES

Petitioner – plaintiff-respondent and cross-appellant in the court below – is Thomas A. Battaglia. Respondents – defendants-appellants and cross-respondents in the court below – are the Union County Welfare Board, an entity of the State of New Jersey, Leda Perselay, Benedict Laganga, William Merritt, Debra Greenberg, Jacob W. Krowicki, Jr., Jeffrey W. Maccarelli, Joanne Rajoppi, Anthony Russo, and Anthony Amalfe, individually and as Members of the Union County Welfare Board, Harry Pappas, individually and as Chairman of and agent for the Union County Democratic Committee, and Union County Democratic Committee, an entity created under the laws of New Jersey.

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IN THE

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THOMAS A. BATTAGLIA,
Petitioner,

v.

UNION COUNTY WELFARE BOARD, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner Thomas A. Battaglia respectfully petitions this Court, pursuant to 28 U.S.C. § 1257(3) and Rule 19 of the Rules of this Court, for a Writ of Certiorari to the New Jersey Supreme Court, in the case of *Battaglia v. Union County Welfare Board,* 88 N.J. 48, 438 A.2d 530 (1981).

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported at 88 N.J. 48, 438 A.2d 530, and is set forth in Appendix A attached hereto. The Superior Court of New Jersey delivered an unreported, oral opinion on November 29, 1978 granting Respondents' motion for summary judg-

ment and dismissing Petitioner's complaint. This opinion is set forth in Appendix B attached hereto. The per curiam decision of the Superior Court of New Jersey, Appellate Division issued on June 16, 1980, is unreported and is set forth in Appendix C attached hereto.

JURISDICTION

The judgment of the New Jersey Supreme Court was entered on December 16, 1981. This Court has jurisdiction under 28 U.S.C. § 1257(3) to review the final judgment of the New Jersey Supreme Court, which is the "highest court of [New Jersey] in which a decision could be had . . . ."

CONSTITUTIONAL PROVISIONS INVOLVED

The following constitutional provisions are pertinent to this case: the First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment. The texts of these provisions are set forth in Appendix E attached hereto.

STATEMENT OF THE CASE

Petitioner Thomas Battaglia was appointed in July 1977 by Respondent Union County Welfare Board to a one-year term as a part time legal assistant at an annual salary of $10,154. App. A, 2a-3a; App. D, 43a-44a.[1] During that

[1]This case was decided on the pleadings in a motion for summary judgment. None of the relevant facts in Battaglia's verified complaint and affidavit, which are attached as Appendix D, was ever controverted. The New Jersey courts assumed as true the facts alleged by Battaglia. The only evidence submitted by Respondents was a one-page form appointing Battaglia to his position; a copy of N.J.A.C. 10:109-2.2, the relevant portion of which is contained in note 2, *infra*; and an affidavit by the county personnel director stating that Battaglia was in the unclassified service of the New Jersey Civil Service, which is relevant only to state law claims that are, of course, abandoned in this Court. App. C, 41a.

year Battaglia performed all duties conscientiously and diligently. In May 1978 Battaglia spoke with a majority of the Respondent Board members who told him that his reappointment would present "no difficulty." App. A, 2a; App. D, 51a. However, one month later Battaglia learned that Respondent Harry Pappas, the newly elected Chairman of Respondent Union County Democratic Committee, had not recommended his reappointment. App. A, 2a-3a; App. D, 51a. The Chairman was offended because Battaglia, his wife, and some of his friends had opposed Pappas' election as County Democratic Chairman. App. A, 2a-3a; App. D, 51a. Battaglia spoke to several Board members who confirmed that they would not vote for him because the "Party" did not want it. App. A, 2a-3a; App. D, 52a. The Chairman's dislike for Battaglia, borne of Battaglia's political support for someone else, was the sole reason Battaglia was not reappointed. No member of the County Welfare Board ever questioned Battaglia's competence as a legal assistant or manifested any lack of confidence in him. App. D, 52a.

Battaglia filed suit *pro se* against Respondents in New Jersey Superior Court claiming violations of, *inter alia,* the Civil Rights Act, 42 U.S.C. §§ 1983, 1985, 1986, and the United States Constitution. App. D, 45a, 46a, 47a-48a. The Superior Court granted summary judgment in favor of Respondents. App. B, 34a.

On appeal, Battaglia reasserted his claim that the refusal of the County Welfare Board to continue his employment for political reasons violated the United States Constitution. App. C, 37a. The Appellate Division, relying upon this Court's decisions in *Elrod v. Burns,* 427 U.S. 347 (1976), and *Branti v. Finkel,* 445 U.S. 507 (1980), reversed the summary judgment and remanded the case for a plenary hearing to determine whether the failure to reappoint Battaglia was motivated by political reasons and, if

so, whether Battaglia's "position was of such nature that party affiliation was an appropriate requirement for the performance of his duties." App. C, 38a.

On cross-petitions for certification, a divided New Jersey Supreme Court reversed. Relying upon the job description for counsel to county welfare boards contained in a state administrative regulation,[2] the Court held that because Battaglia could be called upon to provide confidential advice and legal guidance to the Welfare Board, his political affiliation was an "appropriate qualification" for his job as legal assistant. App. A, 17a. The Court effectively adopted a *per se* rule that any attorney to a public body may be dismissed for political reasons: "[s]ince the attorney-client relationship is a confidential one, it is appropriate for the attorney to have a

[2]The Division of Public Welfare of the New Jersey Department of Human Services has promulgated regulation N.J.A.C. 10:109-2.2(m)1, which relates to county welfare boards. That regulation describes the duties of counsel, associate counsel, and legal assistant.

> The appointment of counsel, associate counsel, and/or legal assistant shall be understood to include all of the following duties, and may include such additional duties as the county welfare board may prescribe:
>
> i. Renders legal opinions and gives legal guidance on all matters affecting welfare board administration;
>
> ii. Prepares all legal documents and represents the welfare board in court proceedings necessary for welfare board administration of the several public assistance programs for which the county welfare board is responsible under statute and regulations promulgated by the State Division of Public Welfare;
>
> iii. Acts as proctor to and/or administrator of estates of deceased clients, where appropriate and necessary;
>
> iv. Assumes responsibility for carrying through all guardianship proceedings on behalf of incompetent clients.

political philosophy compatible with that of the client. App. A, 16a.

Justice Pollock, joined by Justice Clifford, dissented. He argued, first, that the political dispute for which Battaglia was dismissed was not between Battaglia and his employer, Respondent County Welfare Board, but between Battaglia and Respondent Chairman of the Union County Democratic Committee, who is not even a member of the Welfare Board. "The sole reason the Board failed to continue Battaglia's employment was that as a matter of party discipline, the county chairman wanted to punish Battaglia." App. A, 21a. Second, Justice Pollock argued that because Battaglia's position of part time, legal assistant had no political or policymaking content – in part, at least, because the County Welfare Board was designedly immunized from county politics – he could not be dismissed for political reasons. App. A, 23a-25a.

REASONS FOR GRANTING THE WRIT

The decision in this case is in clear conflict with this Court's decision in *Branti v. Finkel*, 445 U.S. 507 (1980). As noted by the dissent, the decision sanctions the use of patronage to punish a public attorney for the exercise of his First Amendment rights in matters unrelated to his position with a public agency. App. A, 25a. This lawsuit thus highlights the evils that this Court's holdings in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel, supra*, sought to avert.

After one year of satisfactorily performing his duties as a $10,000 a year, part time legal assistant to the Union County Welfare Board – duties that included evaluating cases to determine whether welfare recipients should be prosecuted for fraud in accordance with Board policy –

Petitioner Battaglia was dismissed because of his political beliefs. His dismissal was not sought by members of the Welfare Board for whom he worked, but by the Chairman of the Union County Democratic Committee. The Chairman, who holds no public office, is not responsible to the electorate, has no statutory concern with the operation of the Welfare Board, and who was, therefore, in no position to adjudge Battaglia's work, commanded his dismissal solely because Battaglia, his wife, and his friends had not thrown their political support to the Chairman. And as a matter of party discipline, a majority of members of the Welfare Board acquiesced in the Chairman's vindictive desire to punish Battaglia.

The Supreme Court of New Jersey upheld Battaglia's dismissal by relying upon a standard of review that was expressly disavowed by this Court in *Branti v. Finkel, supra.* In this section we initially outline the First Amendment jurisprudence that informs adjudications of patronage dismissals. We then demonstrate that the standards applied by the New Jersey Supreme Court in this case were so wrong resulting in a precedent so pernicious that review by this Court is justified.

A. Controlling Decisions of this Court on Patronage Dismissals

Although rooted in traditional First Amendment adjudication, the principle that patronage dismissals are constitutionally suspect was first given expression by this Court in *Elrod v. Burns,* 427 U.S. 347 (1976). In that case, employees of the Sheriff's Office of Cook County, who were discharged after an election because they were of the wrong political party, claimed that the dismissals impermissibly abridged their First Amendment freedoms of political belief and association.

Writing for three members of the Court, Justice Brennan held that patronage dismissals could be justified only if the hiring authority could show that they furthered some vital governmental interest "by a means that is least restrictive of freedom of belief and association." 427 U.S. at 363. The plurality agreed that the political loyalty of public employees furthered the state interest in assuring that policies sanctioned by the electorate were implemented. *Id.* at 367. However, the wholesale dismissal of all out-party employees was unnecessarily broad, because "[n]on-policymaking individuals usually have only limited responsibility and are therefore not in a position to thwart the goals of the in-party." *Id.* Therefore, the plurality ruled that only employees who held policymaking positions could be dismissed for political reasons.

Justices Stewart and Blackmun concurred in the judgment of the plurality on the ground that a "nonpolicymaking, nonconfidential government employee" may not be dismissed upon the "sole ground of his political beliefs." *Id.* at 375.

Four years after *Elrod*, this Court re-examined the question of patronage dismissals in *Branti v. Finkel*, 445 U.S. 507 (1980). In *Branti*, two assistant public defenders were notified that they were to be dismissed for political reasons by the newly appointed county public defender. Although *Branti* reaffirmed *Elrod v. Burns, supra*, the decision eschewed the policymaking-nonpolicymaking, confidential-nonconfidential distinctions drawn by the plurality and concurring opinions in *Elrod*. It is "clear that party affiliation is not necessarily relevant to every policymaking or confidential position." *Id.* at 518. "[T]he ultimate inquiry is not whether the label 'policy-maker' or 'confidential' fits a particular position; rather, the question is whether *the hiring authority can demonstrate that party affiliation is an appropriate requirement for the ef-*

fective performance of the public office involved." Id. (emphasis added).

The significance of the shift in the standard of review between *Elrod* and *Branti*[3] is underscored by the fact that Justice Stewart, who concurred in the judgment in *Elrod*, dissented in *Branti* on the ground that assistant public defenders are not nonconfidential employees. 445 U.S. at 520-521 (Stewart, J., dissenting). In his view all publicly-employed attorneys could be dismissed for political reasons because he could "think of few occupational relationships more instinct with the necessity of mutual confidence and trust . . . ." *Id.* at 521.

This view, of course, was squarely rejected by the majority. For the Court upheld injunctive relief in favor of the two assistant public defenders, because political allegiance has no relevance to the effective performance of the position of assistant public defender. *Id.* at 509-510, 520.

B. Improper Standard of Review Used by the Court Below

Although the standard of review established in *Branti* could hardly be clearer — "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved" — the Supreme Court of New Jersey mistakenly relied upon the *Elrod* policymaking, confidentiality test to uphold Battaglia's dismissal. According to the Court, Battaglia's "attorney-client relationship could include the Board's confidential communications. Those

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[3] *Cf.* Ness v. Marshall, 660 F.2d 517, 520 (3rd Cir. 1981) (*Branti* "modified" *Elrod* formulation); Bavoso v. Harding, 507 F. Supp. 313, 315 (S.D.N.Y. 1980) (*Branti* "seemingly abandoned" test established in *Elrod*).

confidences could properly concern policymaking or other matters that were an integral part of its political philosophy. The Board had the right to repose its trust and confidence in its counsel and legal assistants . . . . Assuredly, a public body should not be compelled, at least in the absence of some legislative directive, to retain an attorney when those elements do not exist." App. A, 15a-16a (footnote omitted). In effect, the Court established a *per se* ruie that any public attorney may be dismissed for political reasons.

Having applied the wrong standard, it is not surprising that the Supreme Court of New Jersey reached the wrong conclusion. Each of the elements that the Court relied upon to justify Battaglia's dismissal – possible confidential communications, possible policymaking, the need for trust and confidence – is present in any attorney-client relationship, as both the *Branti* majority opinion and dissent by Justice Stewart recognize. 445 U.S. at 519 (majority opinion); *id.* at 521 (Stewart, J., dissenting). Yet as the decision in *Branti* makes palpably clear, public attorneys are not *ipso facto* subject to patronage dismissal.

The only proper inquiry in this case is whether Battaglia's political allegiance to the County Democratic Chairman is an "appropriate requirement" for the effective discharge of his duties as a part time legal assistant to the County Welfare Board. On the present state of the record,[4] it is clear that Respondent Welfare Board has not discharged its burden.[5]

[4] *See* note 1, *supra.*

[5] The burden of proving that a patronage dismissal is permissible under the First Amendment lies with the Welfare Board. *See* Branti v. Finkel, 445 U.S. at 518 (question is whether the "hiring authority can demonstrate" necessity for party affiliation). *Cf.* Illinois State Employees Union v. Lewis, 473 F.2d 561, 574 (1972) (Stevens, J.) ("justification is a matter of proof, or at least argument, directed at particular kinds of jobs"), *cert. denied*, 410 U.S. 928 (1973).

First, whatever political differences the Chairman may have with Battaglia, they were not shared by the Welfare Board, Battaglia's employer. To the contrary, the only evidence in the case is that a majority of the Board believed that Battaglia would have "no difficulty being reappointed," App. D, 51a, a clear indication of their faith in Battaglia's work and his suitability for the job. Since whatever confidences reposed in Battaglia came from the Board and not from the Chairman; since whatever advice Battaglia provided was given to the Board and not the Chairman; since whatever trust Battaglia's job required needed to be instilled in his client the Board and not the Chairman, Battaglia's failure to support the Chairman has no conceivable relevance to the "effective performance of [Battaglia's] public office."[6]

The Chairmanship of the Union County Democratic Party is not a public office. The Chairman has no legal responsibility for the policies of the Union County Welfare Board. His political concerns and views on policy, therefore, should not excite any interest in the Board. In short, Battaglia's dismissal was ordered by someone in whom no public trust is reposed. *See* Editorial, 109 N.J.L.J. 140 (1982) (county chairman is "not an official responsible to the entire population"). Surely the exacting test of *Branti*, with its regard for the rights of political

[6]The opinion of the Court below misconstrues the significance of the fact that Battaglia's political dispute was with the Chairman and not the Board. *See* App. A, 18a n.8. Responding to the dissent of Justice Pollock, *see* App. A, 21a, the majority argues that it is only because the Board acted upon the Chairman's political desire to punish Battaglia that Battaglia has a First Amendment claim; that had Battaglia been dismissed by the Board for any reason other than politics, he would have had no First Amendment claim at all. This argument, while true, misses the point. That Battaglia's political differences were not with his employer casts substantial doubt on the relevance of Battaglia's political allegiance to the Chairman as a requirement to retain his job as part time legal assistant to the Board.

belief and association, would not sanction the patronage dismissal of a public employee at the behest, say, of a party contributor.

Second, even if it were true that Battaglia and the Board differed in their political views, there is no evidence that the Board has the statutory leeway to give expression to political views. As Justice Pollock argues forcefully in dissent, a New Jersey county "welfare board has limited discretion. For the most part, welfare boards serve to administer programs funded by federal, state, and county governments. Accordingly, a board's discretion is severely restricted by state and federal regulation." App. A, 23a (footnote omitted). Moreover, as Justice Pollock points out, the structure of the welfare boards – five to seven members serving staggered five-year terms and headed by a director whose employment is controlled by state civil service rules – suggests a deliberate legislative intent to insulate the boards from partisan politics. App. A, 23a-24a. But regardless of whether the Board ultimately could discharge its burden to show that it has the statutory discretion under New Jersey law which would make politics an "appropriate requirement" for Battaglia's job, Respondents have presented no evidence,[7] and none is in the record, to demonstrate that political views are relevant to the Board's activities.

Third, even if the decisions of the Board on welfare administration may involve policymaking concerns, there is no evidence that Battaglia's political views were relevant to the discharge of his duties, as *Branti* requires. That Battaglia was a part time "legal assistant" earning $10,000 per year shows that his job, however important, was not one that carried with it a great deal of autonomy and authority. According to the Court below, Battaglia

[7] *See* note 1, *supra*.

evaluated cases to determine whether, for example, he should recommend in accordance with Board policy the prosecution of a welfare recipient for fraud. App. A, 3a. This is consistent with the assertion in Battaglia's verified complaint that he was "a nonpolicymaking and nonconfidential employee," an assertion that no evidence tendered by Respondents contradicts.[8] App. D, 44a. *See also* App. A, 3a (Battaglia did not "participate in making Board policy, but only applied it").

The Supreme Court of New Jersey made much of the job description for counsel, associate counsel, and legal assistant contained in a regulation, N.J.A.C. 10:109-2.2, of the Division of Public Welfare of the New Jersey Department of Human Services.[9] However, as Justice Pollock's dissent points out, App. A, 24a, nothing in the regulation refers to making "policy," a word that does not appear in the job description. Most important, there is nothing in the regulation from which it can be inferred that the political affiliation of the legal assistant is relevant to the discharge of his responsibilities.

Because of the absence of any evidence from Respondents contradicting Battaglia's assertion about the lack of any policymaking responsibility in his job, the New Jersey Supreme Court's analysis had to be cast in the subjunctive mood: Battaglia "could" be requested to render legal opinions; he "could" be called upon to prepare all legal documents; his attorney-client relationship "could" include the Board's confidential communications; these confidences "could" concern policymaking. App. A, 15a. The short of it is, the Supreme Court of New Jersey impermissibly chose to speculate about the nature of Battaglia's

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[8] *See* note 1, *supra*.

[9] Note 2, *supra*, sets forth the language of that regulation upon which the Supreme Court of New Jersey relied. *See* App. A, 14a-15a.

job, rather than to rely upon the description provided in Battaglia's verified complaint and affidavit.

Reliance alone upon a job description to defeat a First Amendment claim is unacceptable under *Branti*. N.J.A.C. 10:109-2.2 is of broad, state-wide applicability; it certainly was not tailored to the Union County Welfare Board. More fundamentally, an abstract job description, whose validity no one has attested to, cannot determine conclusively what Battaglia's job called for in the face of his contradictory evidence – the only evidence in the case. As the courts have uniformly held in another area of federal law where the nature of the job is crucial, the Equal Pay Act, 29 U.S.C. § 206(a), "the controlling factor . . . has to be *job content*, not the job description of the employer." *Brennan v. Victoria Bank and Trust Co.*, 493 F.2d 896 (5th Cir. 1974) (emphasis in original); *accord, Brennan v. Prince William Hospital Corp.*, 503 F.2d 282 (4th Cir. 1974).

The Supreme Court of New Jersey relied upon a number of patronage dismissal cases to buttress its conclusion: *Ness v. Marshall*, 660 F.2d 517 (3rd Cir. 1981); *Alfaro DeQuevedo v. DeJesus Schuck*, 556 F.2d 591 (1st Cir. 1977); *Catterson v. Case*, 472 F. Supp. 833 (E.D.N.Y. 1979). Reliance on these cases is misplaced. Because both *Alfaro DeQuevedo* and *Catterson* were adjudicated before this Court's decision in *Branti*, their decisions rely upon the *Elrod* confidentiality-policymaking test, which the *Branti* test supersedes. *Alfaro DeQuevedo, supra*, 556 F.2d at 592 (vital inquiry is whether position is a "policymaking" one); *Catterson, supra*, 472 F. Supp. at 836 ("sole issue" is whether claimant was a "policymaking or confidential employee") (footnote omitted). Since virtually any attorney is a "confidential employee," *see Branti v. Finkel*, 445 U.S. at 521 (Stewart, J., dissenting), virtual-

ly any attorney would be subject to patronage dismissal under the pre-*Branti, Elrod* test.

Although *Ness v. Marshall, supra*, was decided after *Branti,* the attorney position at issue in that case was far different from Battaglia's. In *Ness,* claimants were the solicitor and assistant solicitors for the city of York, Pennsylvania. They were appointed to their positions by one mayor and were dismissed by a subsequently elected mayor from a different party. In analyzing under *Branti* the appropriateness of party affiliation to the effective performance of their jobs, the court pointed out that the solicitor is the chief law officer of the city, has control over all city law matters, and renders legal advice to the city council, the mayor, and department heads. 660 F.2d at 521. Their actual jobs, as established by deposition, *id.*, had substantial policy content. *Id.* In this case, by contrast, there is no evidence that Battaglia's part time job as legal assistant included discretionary choices in the resolution of which political affiliation was relevant.

A decision far more relevant to the case at bar is *Layden v. Costello,* 517 F. Supp. 860 (N.D.N.Y. 1981). There the attorney for the Washington County, New York Department of Social Services was dismissed for political reasons by the commissioner of the Department. Even though the job description, unlike Battaglia's, appeared to comprehend a latitude of discretion,[10] the court held that the dismissal was unconstitutional under *Branti.*

The Supreme Court of New Jersey failed to conduct the appropriate inquiry into the nature of Battaglia's job as

[10]*See* 517 F. Supp. at 861 (work performed in accordance with overall policies of the Department with "wide latitude for the exercise of independent judgment"). Although it is not entirely clear, it appears that the job also involved the supervision of employees, unlike Battaglia's. *Id.*

Branti requires. Rather, it effectively adopted a *per se* rule under which any public attorney would be subject to patronage dismissal. This disserves the public interest, which is promoted when attorneys to public institutions are able to provide independent counsel untainted by the demands of political fealty. *See* Editorial, 109 N.J.L.J. 140, 141 (1982) ("Independence of counsel is an important safeguard of the public interest"); "Developments in the Law – Conflicts of Interest in the Legal Profession," 94 Harv. L. Rev. 1244, 1415 (1981) ("Fairness demands that government attorneys perform their duties without giving special consideration to any interests, whether or not their own, that might diverge from the public interest"). Had the Supreme Court of New Jersey properly applied *Branti,* it would have found Battaglia's dismissal unconstitutional. The decision thus clearly conflicts with *Branti,* violates Battaglia's First Amendment freedoms of political belief and association, and thus requires reversal.

CONCLUSION

For the foregoing reasons, this Court should grant the writ of certiorari to the New Jersey Supreme Court. Although Petitioner is aware that only in unusual circumstances will this Court summarily reverse decisions of state courts, that disposition seems appropriate in this case. The decision below is erroneous, and reversal is clearly required by a controlling decision of this Court: *Branti v. Finkel, supra.* Alternatively, the Court might review this case together with *Connick v. Myers,* No. 81-1251, *cert. granted,* 50 U.S.L.W. 3715 (March 9, 1982). *Connick* raises issues similar to the question presented in this case. Together *Connick* and this case would illuminate the scope of *Branti v. Finkel.*

Respectfully submitted,

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March, 1982

Appendix

APPENDIX A

88 N.J. 48

438 A.2d 530

Thomas A. BATTAGLIA, Plaintiff-Respondent and Cross-Appellant,

v.

UNION COUNTY WELFARE BOARD, an entity of the State of New Jersey, Leda Perselay, Benedict Laganga, William Merritt, Debra Greenberg, Jacob W. Krowicki, Jr., Jeffrey W. Maccarelli, Joanne Rajoppi, Anthony Russo, and Anthony Amalfe, all individually and as members of the Union County Welfare Board, Harry Pappas, individually and as Chairman of and agent for the Union County Democratic Committee, and Union County Democratic Committee, an entity created under the laws of the State of New Jersey, Defendants-Appellants and Cross-Respondents.

Supreme Court of New Jersey

Argued Sept. 21, 1981.
Decided Dec. 16, 1981.

SCHREIBER, J.

The principal question presented in this case is whether the plaintiff, an attorney for a county welfare board, who was not continued in employment because of his political beliefs, was deprived of his First Amendment rights.

Plaintiff's verified complaint in lieu of prerogative writs sought to compel the defendant Union County Welfare Board (Board) to retain plaintiff in his position as legal assistant to the Board. Plaintiff also charged Harry Pappas, then Chairman of the Union County Democratic Committee, the individual members of the Union County Welfare Board, and the Union County Democratic Committee with violations of 42 U.S.C. §§ 1983, 1985 and 1986. The trial court granted summary judgment for the defendants.

The plaintiff appealed. The Appellate Division, holding that there were factual issues to be resolved, reversed and remanded. We granted defendants' petitions for certification and plaintiff's cross petition, 85 *N.J.* 485, 427 A.2d 577 (1981).

Plaintiff's contentions are twofold. He argues first that he is a tenured employee by virtue of *N.J.S.A.* 44:7-9 and may be removed only for just cause after notice and hearing. Second, he asserts that the refusal to continue him as legal assistant was based solely upon his political affiliation and consequently violated his First Amendment rights. The verified complaint and affidavits furnish the factual backdrop.

Plaintiff, an attorney-at-law and member of the New Jersey Bar, was hired by the Board as a legal assistant for one year. The term began on July 5, 1977 and ended on July 4, 1978. Plaintiff learned on June 19, 1978 that he would have some trouble being reappointed because Harry Pappas, the new Democratic County Chairman, had not recommended him. Pappas was offended because plaintiff and his friends, members of the New Democratic Coalition, had opposed Pappas's election as Democratic County Chairman. Plaintiff spoke to several Board members

who confirmed that they would not vote for him because the "Party" did not want it. Plaintiff was not reappointed as legal assistant.

The legal assistant's position was part-time, 70 hours per month, and the annual salary was $10,154. The job was not within the classified civil service and plaintiff conceded before the trial court that he was not entitled to protection under the civil service law. Plaintiff contends for the first time in his cross petition for certification that his position was "classified."

Plaintiff claims that as a legal assistant he was a non-policymaking and nonconfidential employee. He stated during the oral arguments before the trial court and this Court that he did not participate in making Board policy, but only applied it. For example, he would evaluate a case to determine if there was fraud and transmit the matter to the prosecutor in accordance with Board policy that fraud cases involving more than $500 be submitted for prosecution. Plaintiff also claimed that he did not have the same confidential attorney-client relationship with the Board that an attorney has with a private client.

The trial court found that the Board has authority to retain counsel for a specific period of time and then within its discretion retain someone else. The plaintiff had not been discharged; he simply had not been rehired. The trial court stated that plaintiff's legal opinions were relied upon by the Board and indicated that he held a policymaking position. The court further found that plaintiff had not been deprived of a constitutionally protected property or liberty interest contrary to the Fourteenth Amendment. Finally, it pointed out that *N.J.S.A.* 44:7-9 did not cloak plaintiff with tenure as legal assistant, particularly in view of the statutory language and the regulations of the

Department of Human Services, Division of Public Welfare, which exclude legal counsel for county welfare boards from civil service coverage.

The Appellate Division agreed that plaintiff did not have a valid claim to hold employment indefinitely during good behavior. However, the Appellate Division remanded the matter to the trial court to determine if plaintiff was discharged solely for political reasons and, if so, whether plaintiff occupied a position for which political affiliation was an appropriate job requirement. The Appellate Division's analysis differed somewhat from the trial court's since the Appellate Division had the benefit of the United States Supreme Court opinion in *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), decided after the lower court's opinion.

We first address plaintiff's contention that he was entitled to protection under N.J.S.A. 44:7-9, a statute governing county welfare boards.

I

N.J.S.A. 44:7-9 provides generally for the organization of the county welfare boards. It states:

> All employees of the county welfare board shall hold their office or employment during good behavior, and may be removed upon written charges and after a hearing, due notice of which shall be given therefor by the county welfare board, for misconduct, neglect, incompetency, or other just cause.

The provision then continues:

> All paid officers and employees of any county welfare board, *except any attorney serving as legal counsel,* which county welfare board operates under the provisions of Title 11, Civil Service, shall be and the same hereby are classified in the competitive class of the classified service . . . [emphasis supplied]

Plaintiff claims that irrespective of the civil service statute (Title 11), once he became an employee of the county welfare board he was entitled to hold that office during good behavior and therefore he had tenure.

[1, 2] This contention is misplaced. The above statute contemplates two distinct methods under which a county welfare board may operate. If the county has not elected to make the welfare board's employees subject to civil service, then they would be protected under the general provision in N.J.S.A. 44:7-9 quoted in the first paragraph above. If an election has been made, then Title 11, Civil Service, governs. When that occurs, however, the second paragraph of N.J.S.A. 44:7-9 quoted above excludes attorneys serving as legal counsel from the classified service and consequently from the protection afforded by that classification.

[3] Since Union County had elected to place its employees under the aegis of civil service, plaintiff as legal assistant fell within the unclassified category. Plaintiff admitted at the trial that his status has always been unclassified. His signed request for personnel action submitted to the Department of Civil Service upon his appointment reflected that his position was unclassified. The uncontradicted affidavit of the county personnel director asserted that plaintiff's position had always been in the unclassified service. Indeed, the statutory language ex-

plicitly excludes from the classified service attorneys serving as legal counsel to county welfare boards.[1]

II

[4, 5] Under the Fourteenth Amendment a public employee may not be deprived by the State of "property" or "liberty" without due process of law. *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Bishop v. Wood,* 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). The Supreme Court has held that a public employee who has no statutory or contractual entitlement to his job has no property interest. Thus, an employee hired at will or one whose term of office has expired has no entitlement to the position and may not prevail on a claim that loss of the employment constituted deprivation of property. *See Board of Regents v. Roth,* 408 U.S. at 578, 92 S.Ct. at 2709, 33 L.Ed.2d at 561 (holding that no property interest existed in employment at expiration of college teacher's one-year term).

[6] Plaintiff has not asserted a property interest. Since, as discussed above, he had no statutory or contractual right to the legal assistant's position, plaintiff did not lose a property right when his term of office had been completed. However, plaintiff, relying upon *Nicoletta v. North Jersey District Water Supply Commission,* 77 N.J. 145, 390 A.2d 90 (1978), claims that the State has deprived

[1] In his cross petition for certification, plaintiff claims for the first time that he is entitled to civil service protection because of certain provisions in Title 11. Since the issue was not raised below, we see no need to pass upon the matter. *Cox v. Valley Fair Corp.*, 83 N.J. 381, 387, 416 A.2d 809 (1980).

him, contrary to the Fourteenth Amendment, of his "liberty" interests without due process of law. Plaintiff's position is not sound.

[7] In *Nicoletta,* we held that an at-will public employee, not in the classified civil service, was entitled to a due process hearing because, under then existent civil service regulations, removal exposed him to potential disqualification from further public employment. Under those circumstances we held that impairment of future employability by operation of state law constituted deprivation of a "liberty" interest entitled to protection under the Fourteenth Amendment. Such protection ordinarily consists of a hearing "to clear any damage to [the employee's] reputation." *Williams v. Civil Service Commission,* 66 N.J. 152, 157, 329 A.2d 556 (1974); *accord, Codd v. Velger,* 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977).

[8] Plaintiff does not face disqualification from future public employment because the civil service regulation which allowed the plaintiff to prevail in *Nicoletta* has been amended. The regulation now provides that potential disqualification may occur only when the public employee "[h]as been dismissed from the public service for delinquency or misconduct after an opportunity for a hearing." N.J.A.C. 4:1-8.14(b)(6). Plaintiff's dismissal was not attributable to delinquency or misconduct so the civil service regulation does not disqualify him from public service in the future.

Plaintiff has not charged that the termination of employment reflected adversely on his reputation. There has been no public disclosure by the public employer that could be said to have impaired plaintiff's reputation, honor or integrity. Hence, no basis for injury to his "liber-

ty" interest in this respect is apparent or is advanced. *Bishop v. Wood,* 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976).

III

[9-11] We come next to the heart of plaintiff's case. He claims that his First Amendment right to express his political beliefs precludes nonrenewal of his contract. Such a right may be asserted despite the lack of a contractual or tenure right to reemployment. *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). First Amendment rights are incorporated in the Fourteenth Amendment and therefore limit state action. *See Edelman v. Jordan,* 415 U.S. 651, 667, n.12, 94 S.Ct. 1347, 1358, 39 L.Ed.2d 662, 675 (1974) ("county action is generally state action for purposes of the Fourteenth Amendment"). Though the Fourteenth Amendment bears directly on the State, analytically it is the more specific provisions of the First Amendment that finally govern. *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 639, 63 S.Ct. 1178, 1186, 87 L.Ed. 1628, 1638 (1943).

Two Supreme Court opinions serve as our yardsticks, *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and *Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). In *Elrod,* a newly elected Democratic sheriff discharged nontenured Republican employees – a process server, an office employee, a bailiff and an office supervisor – and replaced them in accord with past patronage practice. Justice Brennan, writing for a plurality of three members of the Court,[2] held that discharges ascribable to political patronage

[2]Justice Stevens did not participate and the decision was made by an eight-person Court.

infringed upon the employees' First Amendment rights of political belief and association. To be valid such discharges would have to serve a compelling state interest that could not be served in a less drastic manner. Justice Brennan found that this test was not met with respect to the employees concerned. He agreed that "[l]imiting patronage dismissals to policy making positions" would be sufficient to achieve proper governmental purposes. In this manner "representative government [would] not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." 427 U.S. at 367, 96 S.Ct. at 2687, 49 L.Ed.2d at 562. When that governmental purpose is not served, conditioning continued employment on support of a political party is constitutionally impermissible.

Justice Stewart, joined by Justice Blackmun, concurred. The concurrence, and consequently the holding of *Elrod,*[3] expressed the view that a "nonpolicymaking, nonconfidential government employee [cannot] be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." 427 U.S. at 375, 96 S.Ct. at 2690, 49 L.Ed.2d at 566.

Justice Powell, the Chief Justice and Justice Rehnquist dissented. Their rationale centered on the historical and governmental justification of the political patronage system, although they also questioned the right of employees to dispute the validity of a system of which they had been the beneficiaries.

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[3]See *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed 2d 260, 266 (1977) (the holding of a divided majority may be viewed as that position taken by the justices who concurred in the judgment on the narrowest grounds).

In *Branti v. Finkel,* a challenge was raised when a newly appointed Public Defender of a different political party from that of his predecessor attempted to discharge assistant public defenders because of their political beliefs. The assistants served at the pleasure of the Public Defender. The Supreme Court upheld a permanent injunction enjoining such terminations. Justice Stevens, writing for a six-person majority, held that "if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." 445 U.S. at 517, 100 S.Ct. at 1294, 63 L.Ed.2d at 583. The criteria were not necessarily whether the job was confidential or policymaking in character. The true question was "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518, 100 S.Ct. at 1295, 63 L.Ed.2d at 584.

Justice Stewart dissented. He believed that the assistants as lawyers in the Public Defender's office had a relationship of confidence and trust with the Public Defender. He analogized the situation to that of a firm of lawyers. Justice Powell, joined in dissent by Justice Rehnquist, contended as he had in *Elrod* that the patronage system served an appropriate governmental function. He also could not envision any reason for differentiating between selection by the electorate of the Public Defender and assistant public defenders and delegation of authority to make that selection to duly elected representatives.

[12] We are bound by the Supreme Court's interpretation and application of the First Amendment and its impact upon the states under the Fourteenth Amendment. As

we previously observed, the holding of *Elrod* was that a nonpolicymaking, nonconfidential public employee could not lawfuly be discharged solely because of his political beliefs. *Branti* refined that principle. It posed the problem in terms of job qualification. Was party affiliation an appropriate requirement for the effective performance of the position?

The Court's reasoning indicated that policymaking and confidentiality may or may not be helpful criteria in deciding whether party affiliation is an appropriate employment condition. The Court set forth several examples. A state election law requiring that precincts be supervised by two election judges of different parties could properly lead to the discharge of a judge who had changed his party registration. Yet the position does not involve policy decisions or access to confidential information. On the other hand, the effective performance of a policymaking position would not necessarily require a certain party affiliation. For example, a football coach's policymaking activities at the state university do not depend on whether he is a Republican or Democrat. However, *Branti* explained that it was self-evident that a governor's speech writer, press secretary and legislative liaison should share his political beliefs and party commitments to effectively carry out their duties. In each of these situations it is likely that confidentiality and policymaking would be constituent elements of the job. Thus, *Branti* did not eliminate the policymaking and confidentiality factors espoused in *Elrod*. Those criteria may not be conclusive but could properly be elements in deciding whether party affiliation would probably cause an official to be ineffective in performing the duties of his office.

Branti extended First Amendment protection to the assistant public defender for two reasons. First, his principal responsibility was to represent a defendant in a criminal proceeding and his confidential attorney-client relationship was with that person. Second, whatever policy-making occurred in the Public Defender's office insofar as the assistant public defender was concerned had to relate to the needs of the individual defendants and not to any partisan political interests. The Court rejected party affiliation as a requisite of being an assistant public defender because of the nonconfidentiality and nonpolicymaking characteristics of the job, and because political considerations would undermine, rather than promote, effective performance by a public defender.

[13, 14] Justice Stevens in *Branti* contrasted the position of an assistant public defender with that of a prosecutor, indicating that party affiliation is an appropriate qualification for that office because of its "broader public responsibilities." 445 U.S. at 518, n. 13, 100 S.Ct. at 1295, 63 L.Ed.2d at 584. Though Justice Stevens wrote that the Court was expressing no opinion with respect to a prosecutor's deputy,[4] it follows that, if a prosecutor's deputy had the same duties as the prosecutor, his party affiliation would likewise be a proper qualification. Thus, *Branti* stands for the proposition that nontenured government attorneys, whose broad public responsibilities are confidential in nature and involve formulating or implementing policy relating to political beliefs, may be discharged when the effective performance of their duties

[4]The Court referred to *Newcomb v. Brennan*, 558 F.2d 825 (7th Cir. 1977), cert. den., 434 U.S. 968, 98 S.Ct. 513, 54 L.Ed2d 455 (1977), wherein dismissal for political reasons of a deputy city attorney who under the municipal code had all the duties imposed by law on the city attorney was upheld.

is compromised because of a difference in political commitment. Conversely, a public employee whose employment does not depend upon such a relationship and whose effective performance is not related to party affiliation may not be discharged because of his political beliefs.

[15] An issue raised in this case is whether the *Branti* principle applies only when a discharge occurs. The defendants contend that plaintiff Battaglia was not discharged, but that his term had expired and he was simply not rehired. Though Justice Stevens posed the question in *Branti* in terms of "discharge," he framed the ultimate inquiry in terms of the "hiring" authority. 445 U.S. at 508, 518, 100 S.Ct. at 1289, 1294, 63 L.Ed.2d at 577, 584. The Supreme Court has not addressed the problem as it might involve filling a newly created position. Nor is it necessary that we do so.[5] In *Branti* the assistant public defenders served at the pleasure of the Public Defender and their terms were said to expire automatically when the Public Defender's term ended. The Supreme Court rejected the contention that a failure to reappoint was not a dismissal. 445 U.S. at 512, n. 6, 100 S.Ct. at 1291, 63 L.Ed.2d at 580. Since no functional difference exists between the failure to reappoint at the end of the fixed term and the dismissal of an at-will employee, the *Branti* rule would appear to be equally applicable to both. *See Brady v. Paterson,* 515 F.Supp. 695 (N.D.N.Y. 1981); Note, "Patronage and the First Amendment after *Elrod v. Burns,*" 78 Colum.L.Rev. 468, 474-75 (1978)("Thus, in the case of non-rehiring, the outcome of the balancing of the burden on first amendment rights against the furtherance of vital state interest is

[5]See discussion in "The Supreme Court, 1975 Term, Patronage Firings," 90 *Harv.L.Rev.* 186, 195-96 (1976), arguing that patronage hirings be treated the same as patronage dismissals.

almost identical to the result arrived at in the case of patronage dismissals.").

IV

[16] We turn next to apply the proposition extrapolated from *Elrod* and *Branti* to determine whether political affiliation is an appropriate qualification for a public employee serving as an attorney for a county welfare board. The answer depends on the responsibilities of the office. Plaintiff contends that he was not in fact called upon during his year of service to perform any function involving policymaking, and that no confidences were communicated to him in his attorney-client relationship with the Board. The flaw in this contention is the failure to consider that the legal assistant was obligated, if called upon, to perform the duties delineated in the job's specifications.

The Division of Public Welfare of the Department of Human Services (Division), pursuant to N.J.S.A. 44:7-6, promulgated regulation N.J.A.C. 10:109-2.2, relating to the personnel of county welfare boards. That regulation prescribes in part that the duties of counsel and legal assistant include all of the following, and may include such additional duties as the county welfare board may prescribe:

> i. Renders legal opinions and gives legal guidance on all matters affecting welfare board administration;
>
> ii. Prepares all legal documents and represents the welfare board in court proceedings necessary for welfare board administration of the several public assistance programs for which the county welfare board is responsible under statute and

regulations promulgated by the State Division of Public Welfare;

iii. Acts as proctor to and/or administrator of estates of deceased clients, where appropriate and necessary;

iv. Assumes responsibility for carrying through all guardianship proceedings on behalf of incompetent clients.

The plaintiff, as one of four legal assistants, could be called upon at any time to perform the same duties as the Board's counsel. As legal assistant he could be requested to render legal opinions and give legal guidance on all matters affecting the Board's administration. He could be called upon to prepare all legal documents, as well as to represent the Board in court proceedings necessary for administration of public assistance programs. The correct perspective is not only what the plaintiff as legal assistant did, but also what the duties of the position were.

[17] As distinguished from the assistant public defender in *Branti,* plaintiff represented the Board. His attorney-client relationship could include the Board's confidential communications. Those confidences could properly concern policymaking or other matters that were an integral part of its political philosophy.[6] The Board had the right to repose its trust and confidence in its counsel and legal assistants. Trust and confidence are the essence of the attorney-client relationship. Assuredly, a public body should not be compelled, at least in the absence of

[6]All parties have assumed that the County Welfare Board's decision-making in some areas, such as determining what fraud cases should be prosecuted, implicate policy choices about which political groups may differ.

some legislative directive, to retain an attorney when those elements do not exist. In *Perrella v. Board of Education of Jersey City,* 51 N.J. 323, 240 A.2d 417 (1968), we referred to

> the peculiar relationship which a member of the bar has as counsel to a public body. It is a position of trust and confidence. It is born in the confidence the public body, rarely of permanent status, has in the ability, honesty and personality of the individual selected. In common sense the relationship is simply that of attorney and client, basic to which, from time immemorial, has been the desirability of personal selection of the attorney by the client. [*Id.* at 331, 240 A.2d 417]

Since the attorney-client relationship is a confidential one, it is appropriate for the attorney to have a political philosophy compatible with that of the client. Particularly when the subject matter of the confidence may relate to that philosophy, the loyalty and trust inherent in the relationship are practical necessities. Responsibilities of the Board's legal counsel are broad in scope and include acting as a high level adviser and participant in formulating the County Welfare Board's plans for implementation of its policy goals. Plaintiff has also described legal counsel's position as one involving "the implementation of policy and discretionary decision making" and at least implicitly agreed that legal counsel could legitimately be required to be of the same political persuasion as the Board. Plaintiff's obligations as legal assistant were as far-reaching as those of the legal counsel and embraced any and all matters that might come before the Board. There is therefore no reason why the legal assistant should not be subject to the same job requirements as the legal counsel,

meaning that party affiliation would be an appropriate qualification for the assistant as well.[7]

In *Ness v. Marshall,* 660 F.2d 517 (3d Cir. 1981), Judge Gibbons of the Third Circuit was recently presented with a similar situation. Plaintiffs, a city solicitor, an assistant solicitor and a second assistant solicitor, were discharged by a newly elected mayor, a Democrat who replaced a Republican. The dismissed attorneys filed suits asserting a violation of their rights under the First Amendment and the Civil Rights Act of 1871, 42 U.S.C. § 1983. The Circuit Court of Appeals affirmed summary judgments in favor of the defendants. It rejected the argument that the assistant and second assistant solicitor acted only on matters unrelated to political goals or commitments and were therefore not subject to removal. Rather, the Court referred to the duties imposed on the city solicitor and his assistants by the city's administrative code. These included rendering legal opinions to the mayor, drafting ordinances and negotiating contracts. A position with these duties was one "for which party affiliation [was] an appropriate requirement." Moreover, the fact that one mayor may have chosen to utilize solicitors in a more restricted manner should and would not stand as a bar to others who may rely on the attorneys to the extent allowed by the code. We find Judge Gibbons's reasoning persuasive. See also *Alfaro DeQuevedo v. DeJesus Schuck,* 556 F.2d 591 (1st Cir. 1977) (relying in part on the job specifications of attorney in charge of criminal justice and not on what the employee did in fact, court held dismissal under new ad-

[7]None of the parties has sought to differentiate intraparty from interparty differences. We have accepted this assumption. See *Mirabella v. Board of Elections,* 507 F.Supp 338 (S.D.N.Y. 1980), and *Catterson v. Caso,* 472 F.Supp. 833 (E.D.N.Y. 1979). To the extent that the Supreme Court has not addressed this question, it may be considered an open one.

ministration was proper); *Catterson v. Caso,* 472 F.Supp. 833 (E.D.N.Y. 1979) (analyzing duties of county attorney in terms of administrative code and holding dismissal arising out of intraparty strife proper). *But see Layden v. Costello,* 517 F.Supp 860 (N.D.N.Y. 1981) (where attorney's job did not require him to perform any duties for the public employer though specifications did, discharge for political reasons held invalid).[8]

The Appellate Division remanded the cause to the trial court to resolve two factual issues: Was plaintiff discharged solely for political reasons? If so, did he occupy a policymaking, confidential position such that party affiliation is an appropriate requirement for effective performance of the job? Even if the discharge were ascribable

[8]A careful reading of the dissent discloses its agreement with the following: (1) An attorney-client relationship existed between the legal assistant and the County Welfare Board; (2) A legal assistant's prescribed duties were the same as the legal counsel and included offering advice to the Board on policy matters; (3) The County Welfare Board could exercise its discretion on some policymaking matters.

The dissent argues that there were no "political differences" between the Welfare Board and the plaintiff, rather the differences existed between the Democratic County Chairman and the plaintiff. The undisputed fact is that the Welfare Board decided not to rehire him. Since the Welfare Board has admitted that it did not rehire plaintiff for political reasons, what motivated the Welfare Board is not relevant. It is *only* because the Welfare Board acted for a political reason that plaintiff has a First Amendment claim. If the Welfare Board had acted on a non-political basis, he clearly would have had no ground for a constitutional challenge. Thus, the dissent's reasoning is flawed, for it argues that plaintiff was not rehired because of the County Chairman's political thinking which it assumes was *not* attributable to the Welfare Board. If that were so, and the Welfare Board had not acted for a political reason, plaintiff would have had no First Amendment claim. See *English v. College of Medicine and Dentistry of N.J.*, 73 N.J. 20, 372 A.2d 295 (1977) (holding that a public employee not in a civil service classification could be lawfully discharged with or without cause in the absence of a contractual, statutory or constitutional protection).

to political causes, the uncontradicted proofs, as in *Ness v. Marshall, supra,* establish as a matter of law that the policymaking and confidential nature of the position potentially involved policymaking responsibilities and that the confidentiality of the position related directly to the public employer, the Union County Welfare Board. Thus, the legal assistant's duties were such that party affiliation was an appropriate requirement of the effective performance of the office.

Judgment of the Appellate Division is reversed and the trial court's judgment of dismissal is reinstated.

POLLOCK, J., dissenting.

The issue on this appeal is whether a county welfare board has met its burden of proving that allegiance to the county chairman of a political party is an appropriate requirement for the effective performance of the office of legal assistant to the board. As a matter of law, the majority concludes that allegiance to the county chairman, who was not a member of the board, is an appropriate requirement for the office. I dissent.

Realistically, the dissent constitutes a plea against any political patronage. It is an argument more properly addressed to the Supreme Court. Our task is to apply the principles enunciated by that body. We refuse to broaden and extend the *Branti v. Finkel* doctrine, which incidentally has been subject to substantial criticism. *Loughney v. Hickey,* 635 F.2d 1063, 1065 (3d Cir. 1980) (Aldisert, J., concurring); *Garretto v. Cooperman,* 510 F.Supp. 816 (S.D.N.Y. 1981); Auerbach, "The Relation of Legal Systems to Social Change," 1980 *Wis.L.Rev.* 1227, 1336 (suggesting that the Supreme Court may be hastening the decline of broad-based political parties which make executive leadership and coherent legislative policy possible). Indeed, it is anomalous that plaintiff who presumably obtained his job because of political patronage and sought to be rehired because of political influence now asserts that methodology is improper.

Because we are reviewing the grant of a motion for summary judgment, we must assume as true all facts set forth in opposition to the motion and accord the opposing party the benefit of all inferences that reasonably may be drawn from these facts. Thus viewed, the relevant facts are that in June, 1977 Battaglia was appointed to a one-year term as a legal assistant to the Union County Welfare Board. In May, 1978, a majority of the members of the Board assured him that he "would have no difficulty being reappointed." The membership of the Board did not change at any material time. In June, 1978, notwithstanding the opposition of Battaglia, his wife and others, Harry Pappas was elected Democratic county chairman. Pappas refused to submit Battaglia's name to the Board for reappointment. Thereafter, Battaglia called several members of the Board who told him that they could not vote for him because Pappas had told them he should not be reappointed. One member explained his refusal by stating as "a matter of party discipline, he had to vote the way the County Chairman [Mr. Pappas] told him." Pappas' instructions were the only reason the Board failed to reappoint Battaglia. Battaglia's dispute was not with the Board, but with Pappas. No one questioned his competence as a legal assistant or manifested any lack of confidence in him.

Neither Pappas nor any member of the Board submitted any affidavit contradicting Battaglia's statement of the facts. The majority finds the uncontradicted facts to be unpersuasive because of the written description of the position of legal assistant.

As with other attorney-client relationships, confidence by members of a public body in their counsel is essential. *See Shakman v. Democratic Organization of Cook Cty.*, 508 F.Supp. 1063, 1069 n. 12 (N.D. Ill. 1981). Because a

difference in party affiliation may affect the confidence of a public body in its counsel, political patronage may have a role in the selection of attorneys for public bodies. In this case, however, there is not a single fact justifying the conclusion that the Board lacked confidence in Battaglia. On the record before us, the opposite is true. The Board believed Battaglia to be competent and, if left alone, it would have continued his employment. The sole reason the Board failed to continue Battaglia's employment was that as a matter of party discipline, the county chairman wanted to punish Battaglia. Consequently, this case differs from cases where, because of political differences, a mayor or governing body does not want to employ an attorney.

Two decisions of the United States Supreme Court establish the degree to which freedom of speech and thought are guaranteed to government employees whose jobs are imperiled by political patronage. In both decisions, the Court placed a higher value on freedom of political thought than on political patronage. In *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), the majority opinion limited patronage dismissals to policymaking and confidential positions. In *Branti v. Finkel,* 445 U.S. 507, 518, 100 S.Ct. 1287, 1294, 63 L.Ed.2d 574 (1980), the Court expanded protection of government employees by stating that the emphasis should not be whether the employee was in a policymaking position, but "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."

The line delineating policymaking positions is hazy, as is the determination whether party affiliation is an appropriate requirement for the effective performance of a

public office. *See Barrett v. Thomas,* 649 F.2d 1193 (5 Cir. 1981) (political demotion of sheriff sergeant impermissible); *Garretto v. Cooperman,* 510 F.Supp. 816 (S.D.N.Y. 1981) (political dismissal of compensation judge permissible) (*Branti* test is *dicta*); *McMullan v. Thornburgh,* 508 F.Supp. 1044 (E.D. Pa. 1981) (political dismissal of dept. of health registrars impermissible); *Shakman v. Democratic Org. of Cook County,* 508 F.Supp. 1063 (N.D.Ill. 1981) (simply showing employee occupies a highly confidential position of significant policymaking not enough to justify political dismissal) (*dicta*); *McMahon v. Board of Selectmen of Town of Newtown,* 506 F.Supp. 537 (D.Conn. 1981) (political dismissal of grants administrator and assistant to first selectman impermissible). Courts have had particular difficulty with the *Elrod* and *Branti* tests in cases involving attorneys for public bodies. *Compare Ness v. Marshall,* 660 F.2d 517 (3 Cir. 1981) (political dismissal of city solicitor proper) and *Bavoso v. Harding,* 507 F.Supp. 313 (S.D.N.Y. 1980) (political dismissal of corporation counsel proper) *with Layden v. Costello,* 517 F.Supp. 860 (N.D.N.Y. 1981) (political dismissal of counsel to Department of Social Services improper).

In assaying the validity of political retaliation as a cause for the termination of public employment, courts have considered various elements, including the structure and duties of the public body employing the dismissed employee, *Bavoso v. Harding, supra,* 507 F.Supp. at 316; and the nature and duties of the employee's position, *see e.g., Ness v. Marshall, supra; Garretto v. Cooperman,* 510 F.Supp. 816, 818 (S.D.N.Y. 1981). Another consideration is whether the political allegiance of the dismissed employee or of the controlling members of the public body has shifted from one party or one faction within a party to

another. We next discuss the application of those considerations to this case.

Like many public bodies, welfare boards have some policymaking authority. Unlike the broad discretionary powers of municipalities, N.J.S.A. 40:48-1 and -2, and of county boards of chosen freeholders, N.J.S.A. 40:20-1, however, a welfare board has limited discretion. For the most part, welfare boards serve to administer programs funded by federal, state and county government. Accordingly, a board's discretion is severely restricted by state and federal regulation.[9]

Aside from its duties, the structure of the board indicates a legislative intention to insulate the board's activities from county politics. Although board members are appointed by the board of chosen freeholders, N.J.S.A.

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[9]*See N.J.A.C.* 10:81-1.2 (Aid to Families With Dependent Children) (AFDC); *N.J.A.C.* 10:83-2.5 (Medical Assistance to the Aged) (MAA); *N.J.A.C.* 10:87-1 (Food Stamps) and *N.J.A.C.* 10:89 (foreword) (Energy Assistance). The Department of Human Services' regulations are extensive, covering every phase of the programs from eligibility, *N.J.A.C.* 10:81-3.1 to −3.39 (AFDC); *N.J.A.C.*10:83-5.1 to −6.21 (MAA); *N.J.A.C.* 10:87-3.2 to −5.10 (Food Stamps); *N.J.A.C.* 10:89-2.1 to −2.3 (Energy Assistance), to recovering fraudulently received payments; *N.J.A.C.* 10:81-7.4D to .42 (AFDC) (board's role limited to determining whether there is a basis for believing fraud occurred; matter is then referred to prosecutor to determine what further action shall be taken); *N.J.A.C.* 10:87-11.2 to −11.9 (Food Stamps) (board's counsel to help decide which cases to refer but establishing state policy that board should initiate court action in cases involving more than one act of fraud or large amounts of money). Federal statutes and regulations are also extensive. *See, e.g.*, 7 *U.S.C.A.* § 2011 *et seq.* (Supp. 1981); *7 C.F.R.* §§ 271.1 to 279.10 (1981) (Food Stamps); 42 *U.S.C.A.* § 601 *et seq.* (1974 and Supp.1981), 45 *C.F.R.* §§ 224.0 to 235.40 (1980) (A.F.D.C.); 42 *U.S.C.A.* § 1396 *et seq.* (1974 & Supp. 1981); 42 *C.F.R.* 430.0 to 456.657 (1980) (Medicaid); 42 *U.S.C.A.* § 8612 et seq. (Supp. 1981); 45 *C.F.R.* §§ 260.1 to 260.314 (1980) (Energy Assistance).

44:1-11 (Supp. 1981), their appointments are for five-year terms that expire seriatim. N.J.S.A. 44:1-12. Because the board contains from five to seven citizen members, N.J.S.A. 44:1-11 (Supp. 1981), it would take at least three years for a new political group to control the board. The apparent intent is to prevent a freeholder board from gaining control of a welfare board in any single year. In addition each board must appoint a director of welfare to serve as its chief executive. N.J.S.A. 44:7-11 (Supp. 1981). As chief executive, the director may influence and must implement decisions of the board. Removal, as well as appointment of the director is controlled by civil service laws, not political patronage, and the political allegiance of the director will not subject him to a patronage dismissal. Nonetheless, the majority concludes that the political allegiance of an assistant counsel so imbues the performance of his duty that he is subject to a patronage dismissal. In the absence of factual support, I do not share that conclusion, particularly here where the county chairman was not a member of the Welfare Board or of the Board of Freeholders. In any event, the Board never stated that Battaglia's political beliefs affected, or even might affect, the effective performance of his duties.

The majority hypothesizes from the job description of a legal assistant sufficient policymaking duties to justify a political dismissal. One can search that description in vain for any reference to the word "policy." Indeed, at oral argument the attorney for the Board conceded that Battaglia was not a policymaker. Nonetheless, the majority speculates that Battaglia or someone else in the position of legal assistant might be asked to serve as a policymaker. Although it is conceivable that Battaglia, as the majority speculates, might have been asked to offer counsel on policymaking, it remains that Battaglia was not a

policymaker and would not have become one if his employment had been continued. As a matter of law, without according him a hearing to test those speculations, the majority deprives Battaglia of his employment. I respectfully submit that decision contravenes *Elrod* and *Branti, supra.*

The majority decision deprives Battaglia of his employment without a plenary hearing on critical factual questions such as (1) whether the Board retained its confidence in him after Pappas became county chairman but refused to appoint him in blind allegiance to Pappas; (2) whether allegiance to the chairman of a political party is an appropriate requirement for the performance of the duties of legal assistant to the Board where the chairman is not a member of the board; (3) whether any Board members were allied with Pappas in his candidacy for county chairman and whether his election signalled any change in Board policy; and (4) whether the position of legal assistant to the Board is a confidential or policymaking position. Where members of a county welfare board and one of its legal assistants are members of the same political party, and the board wants to continue the employment of the assistant, the employment should not be terminated solely because of a political difference between the attorney and the party chairman who is not a member of the board.

Freedom of political belief has been placed high in the constitutional firmament by the United States Supreme Court. Without adequate factual justification, this Court should not tarnish that freedom to accommodate political punishment.

After the trial court granted defendants' motion for summary judgment and while the appeal was pending in

the appellate division, the United States Supreme Court decided *Branti*. Relying on that decision, the Appellate Division reversed the summary judgment and remanded the matter for a plenary hearing. *Accord, DeLong v. United States,* 621 F.2d 618 (4 Cir. 1980) (although court agreed with trial court decision based on *Elrod,* case remanded for reconsideration in light of *Branti*). In the present case, the majority decision improperly relieves the Board of its burden to justify Battaglia's political dismissal. The effect of that decision is to preclude both the public and Battaglia from learning the facts underlying the termination of his employment. Where a government employee, albeit an attorney, has lost his job because he exercised his freedom of political belief, a legalistic construction of a job description is no substitute for full disclosure of the relevant facts. A remand for a plenary hearing is neither an indictment of political patronage nor an extension of *Branti*. I would affirm the judgment of the appellate division and remand the matter to the trial court.

Justice CLIFFORD joins in this dissent.

APPENDIX B

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION UNION COUNTY
DOCKET N. L-47436-77 P.W.

THOMAS A. BATTAGLIA,	:	
Plaintiff,	:	
v.	:	**DECISION OF THE COURT**
UNION COUNTY WELFARE BOARD an entity of the State of New Jersey, et al.,	:	
Defendants.	:	

BEFORE: HONORABLE V. WILLIAM DI BUONO, A.J.S.C. UNION COUNTY COURT-HOUSE, ELIZABETH, N.J.
November 29, 1978

THE COURT: We indicated earlier at the opening of this session that the plaintiff Thomas A. Battaglia instituted this action wherein he contends that he was unlawfully discharged or his services were unlawfully terminated while serving as a legal assistant for the Union County Welfare Board. He seeks reinstatement of that position and he seeks as well interim relief at this par-

ticular point through an order to show cause as to why such relief should not be granted pending any necessary or further hearings.

The Union County Welfare Board as well as a number of individual defendants have countered through the filing of a motion for summary judgment pursuant to Rule 4:46-2.

At this juncture I wish to commend all counsel in this matter, Mr. Battaglia, Mr. Chasnoff, Mr. Manoff and Mr. Spagnoli, for the diligent effort they have injected into this matter. The research they have done has been of great assistance to the Court and I am confident it has taken much of their time.

In a motion for summary judgment "the judgment or order sought shall be rendered forthwith, if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of laws." I am reading directly from the rule. "The court shall find the facts and state its conclusions in accordance with Rule 1:7-4." And of course this rule simply indicates that in civil actions triable by a jury the Court shall in an opinion or memorandum decision, either written or oral, find the facts and state the conclusions of law thereon. The court shall thereupon direct the entry of an appropriate judgment.

The court is cognizant of the guidelines set forth where a motion for summary judgment is sought, in the case of Peoples Bank and Trust Company of Westfield, 17 New Jersey 67, a 1954 case which I believe is still viable as of the present date.

Without alluding to all of the facts which have been presented in this case, the moving papers as well as through the arguments of counsel – and it is interesting to note that I can accept the arguments of counsel here almost as testimony because the plaintiff in this matter in particular, as well as I believe two of the defendants, appear pro se. I find that insofar as the motion for summary judgment is concerned no material fact is disputed, or stated in another way, there are no material facts to be determined which would require a hearing. So that under the Judgen case I think the motion is ripe for summary judgment. While there may be some questions in the motion brought by the plaintiff, I think his contentions become moot by reason of the fact that I am inclined, with all due respect to the most eloquent arguments of Mr. Battaglia to grant the motion for summary judgment.

It is not disputed that Mr. Battaglia was retained by the Union County Welfare Board as a Legal Assistant, that he was retained for a specific period of time, for a period of one year. A joint exhibit has been placed into evidence. Reading from this exhibit, he was hired for a specific sum of money, $10,154, and for a period of one year commencing July 5, 1977, and, under Paragraph 17, and under the terms of employment of 11:22-2(L), which is on the form itself, as an unclassified appointment.

Upon the expiration of the one year period it is admitted that the Union County Welfare Board did not reappoint Mr. Battaglia as a legal assistant. In any event, they did not continue Mr. Battaglia in any capacity. Whether he be called an employee, classified or unclassified, or retained counsel, or whatever reference we wish to make, it is not disputed that he was not continued in any capacity. His services were terminated.

Mr. Battaglia has, of course, contended in his moving papers and in his argument that he was hired as an employee and he was to serve during a term of good behavior, and that the Board was motivated to discharge him for political reasons.

It is interesting to note – the Court makes this observation – that there have been no requirements presented to the Court of Civil Service or otherwise which would continue Mr. Battaglia in office without the need of taking any Civil Service examination for any term of office beyond one year but simply that he would upon an appointment even for a limited period, as indicated in the exhibit, gain immediately tenure, if I accept his arguments, during good behavior simply by this kind of appointment. I know of no precedent for such contention, nor have any been cited.

Mr. Battaglia relies on a number of cases, and one case in particular Elrod v. Burns, 427 U.S. 349 (1976), decided by the United States Supreme Court. I do not find this case to support the contentions presented here by Mr. Battaglia.

Mr. Battaglia in response to my questions clearly indicates – and again this is not in dispute, and that is why I believe this matter is ripe for summary judgment – that he was retained as legal counsel. The Court points out in Elrod that dismissals under the factual circumstances in Elrod clearly applies to non-policy, non-confidential positions. In Elrod I believe the sheriff, who had been elected, was seeking to discharge individuals who were employed in ministerial positions. In the case before the court, Mr. Battaglia's case, he was rendering legal opinions and was relied upon as one who was making determinations which would require a professional background and decision

making such as evaluating cases as to whether or not possibly a welfare recipient, for example, was receiving money by false pretenses or misrepresentation through some fraudulent scheme, and this is not in dispute.

We have already alluded to the Pillsbury case upon which Mr. Battaglia also relies. Here again this case is clearly distinguishable in that the freeholders sought to remove a person as county counsel, contrary to N.J.S.A. 40A:9-43, where counsel had been appointed for a fixed term, and the freeholders sought to relieve counsel prior to the expiration of that period, solely for political reasons. That could not be done.

I think the case of Dyke v. Orlowski is controlling here as well. In that case, reported in 154 New Jersey Superior 377, Judge Furman restates the principle that there is a dichotomy between confidential policy making employees and non-confidential, non-policy making employees. In that case it was held that a policymaking employee could be properly discharged because of political motives.

I think it is interesting to note here, however, that we should clearly establish, or at least this is what is clearly defined from the facts presented, that Mr. Battaglia refers to himself as an employee who was discharged, and I think there is a difference, because his term expired, the term for which he was hired expired.

I find that the Welfare Board had the power to retain counsel for a specific period of time and upon the expiration of that period had within its discretion the right to either retain Mr. Battaglia for an additional period of time or retain someone else. So that under Dyke v. Orlowski the Board could and in fact did exercise its discretion and retained someone else.

Mr. Battaglia relies on the Nicoletta case as well, reported in 77 New Jersey 145. Of course, this case is clearly distinguishable as well. There was a property interest in this case, or at least it was held that the discharged employee was entitled to a hearing where the plaintiff had been discharged in summary fashion by reason of having engaged allegedly in an altercation.

In speaking about property right I think it is interesting to note on Page 154 the court asked and then answered its question: Was Sergeant Nicoletta entitled to a hearing by reason of the manner in which he was discharged under the circumstances? And the Court says in the middle of the page, a little further to the bottom from the middle, "But in this context the key concept is 'entitlement' such as involved in statutory eligibility for welfare benefits," citing a number of cases, "contractual right to employment, a clearly implied promise of continued employment or the like. The chief ingredient of this kind of 'property' interest such as to quicken the right to protection by procedural due process is a 'legitimate claim of entitlement.' As we have seen, the statute here subjects the duration of employment to the will of the employer and as against the exercise of such will, Nicoletta had no 'entitlement' to employment. His status may be analogized to that of the respondent in Roth," and then citing Roth.

Under Paragraph 4 at page 144 the Court continues, "A 'property' interest aside however, it is asserted that the circumstances of Nicoletta's dismissal involved a 'liberty' interest on his part within the intendment of the Fourteenth Amendment. The Supreme Court, as it recalled in Roth, 'has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.'"

This case again I say is clearly distinguishable from the case at hand. Mr. Battaglia had no right to any further expectation under the terms of his employment. He was clearly appointed for a period of one year, and he was not discharged nor was he deprived of any hearing, as was Sergeant Nicoletta.

In Perry v. Sindermann, 408 U.S. 593, the Supreme Court went somewhat further and embraced the theory to continue this a little further. The Court established two prerequisites for such a claim of entitlement. The understanding must be enforceable in a court of law and the public institution must have promoted this understanding by document, word or deed. The verbiage in this case comports with the language in Nicoletta, 77 New Jersey 145, or vice versa.

Absent any of these items, renewal of a nontenured public employee is a benefit that can be granted or withheld at the discretion of the public employer. Arnett v. Kennedy, 416 U.S. 134.

Further, it is the opinion of this Court that New Jersey Statute 44:7-9 does not in any way inure to the benefit of this plaintiff, who contends that he was a general employee or an employee requiring some kind of tenure right or Civil Service right or some right which would continue him in office, as he contends without any other authority, indefinitely or during the course of his good behavior. I know of no such statute or any such authority.

As a matter of fact, if you read the entire statute I am inclined to believe that this section clearly indicates that legal counsel, which would encompass an assistant legal counsel, because that's what you were hired as, is clearly excluded.

It is also interesting to note the Court makes this observation, and I am not quite sure what authority this would have, but it has been submitted, and that is in Ruling No. 11, Department of Human Services, Division of Human Welfare, dated 7/1/77, Part 1, Subparagraph 13, which clarifies, "The positions of Counsel, Associate Counsel, and/or Legal Assistant are construed to require persons who are engaged in the professional capacity of Attorney-at-Law. Any county welfare board may at any time appoint to such position any attorney duly admitted to practice in this state, on an annual compensation basis as set forth in Item 12; provided, however, that;" and then setting forth the duties.

Under Paragraph "b" "Any appointment to the position of Counsel or Associate Counsel, such positions being excluded from the competitive division of the classified service under the provisions of R.S. 44:7-9, shall serve for a term not exceeding two years, but may be reappointed at the discretion of the welfare board."

I think may be germane to the issue before the Court. Certainly it is related to expectations. I don't know why Mr. Battaglia should have an expectation that his position was for life or good behavior.

Thank you, gentlemen. Again I appreciate all of the efforts you have made in this matter. Respectfully, Mr. Battaglia, I must rule against the relief which you seek, and the Court grants, as I have already indicated, the relief sought by all defendants and the motions for summary judgment are hereby granted.

The complaint will be dismissed. Good morning, gentlemen.

MR. BATTAGLIA: Thank you, Judge.

MR. MANOFF: Thank you.

MR. CHASNOFF: Thank you.

MR. SPAGNOLI: Thank you.

APPENDIX C

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1791-78

THOMAS A. BATTAGLIA,
Plaintiff-Appellant,

v.

UNION COUNTY WELFARE BOARD, an entity of the State of New Jersey, LEDA PERSELAY, BENEDICT LAGANGA, WILLIAM MERRITT, DEBRA GREENBERG, JACOB W. KROWICKI, JR., JEFFREY W. MACCARELLI, JOANNE RAJOPPI, ANTHONY RUSSO, and ANTHONY AMALFE, all individually and as members of the Union County Welfare Board, HARRY PAPPAS, individually and as Chairman of and agent for the Union County Democratic Committee, and UNION COUNTY DEMOCRATIC COMMITTEE, an entity created under the laws of the State of New Jersey,

Defendants-Respondents.

Argued May 19, 1980 – Decided June 16 1980

Before Judges Seidman and Michels.

On appeal from Superior Court, Law Division, Union County.

PER CURIAM

Plaintiff, a part-time legal assistant in the employ of the Union County Welfare Board, was not reappointed to that position upon the expiration of his one year term in July 1978. He filed a complaint in lieu of prerogative writs against the board and its individual members in which he alleged that the refusal of the board to reappoint him was based solely upon political factors in violation of his rights under the Federal and State Constitutions. He sought a judgment directing the board to continue him in his position and for damages. In separate counts, plaintiff also sought compensatory and punitive damages against the county Democratic Committee and its chairman, alleging that action was taken improperly by them to induce the board and its members not to reappoint him. Defendants' motion for summary judgment was granted and this appeal followed.

At the hearing on the motion, plaintiff argued that he was entitled to reemployment under *N.J.S.A.* 44:7-9, that he was deprived of a liberty interest without due process of law, and that he was a nonpolicymaking employee of the board who could not be removed from office solely for political reasons. In rendering summary judgment for defendants, the trial judge did not directly address the issue of whether failure to reappoint plaintiff was in fact politically motivated. Instead, he found that plaintiff was

a confidential, policymaking employee of the board who "could be properly discharged because of political motives." He said that plaintiff

> . . . was rendering legal opinions and was relied upon as one who was making determinations which would require a professional background and decision making such as evaluating cases as to whether or not possibly a welfare recipient, for example, was receiving money by false pretenses or misrepresentation through some fraudulent scheme, and this is not in dispute.

The trial judge further found that plaintiff had not been removed or discharged but that "the term for which he was hired expired," and it was within the board's discretion to appoint someone else. He also concluded that *N.J.S.A.* 44:7-9 did not give plaintiff the "kind of tenure right or Civil Service right" he was claiming.

We agree that plaintiff, as a legal assistant appointed for a fixed term, cannot claim any right under *N.J.S.A.* 44:7-9 to hold his office or employment indefinitely during good behavior. Nevertheless, we reverse the judgment entered below and remand the matter for a plenary evidentiary hearing on the issues of whether the failure to reappoint plaintiff was solely for political reasons, and, if so, whether plaintiff's position was of such nature that party affiliation was an appropriate requirement for the performance of his duties. The governing principles of law are those set forth in *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and, more recently in *Branti v. Finkel,* ____ U.S. ____ (decided March 31, 1980).

The primary thrust of the trial judge's ruling was that plaintiff's discharge, if politically motivated, was nevertheless proper because he was a confidential policymaking employee of the board. The trial judge thus sought to remove the case from the ambit of *Elrod v. Burns, supra* which established the principal that a nonpolicymaking, nonconfidential employee of a public entity cannot be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. But it is very much open to question here whether the position of legal assistant to the welfare board, the duties and responsibilities of which are clearly defined in Ruling No. 11 of the Division of Public Welfare, Department of Human Services, issued for the guidance of county welfare boards, fits within the category of a policymaking, confidential employee. One of the guidelines set forth in *Elrod v. Burns* for determining whether a position is of that type is that an employee whose responsibilities are not well-defined or are of broad scope is more likely to function in a policymaking position. Also to be considered is whether the employee acts as an adviser or formulates plans for the implementation of broad goals. *Elrod v. Burns, supra,* 427 U.S. at 368, 96 *S.Ct.* at 2687, 49 *L.Ed.2d* at 562 The governmental employer has the burden of establishing whether the employee occupies such policymaking position, and cases of doubt are resolved in favor of the employee. *Ibid.*

The fact that plaintiff may have functioned as legal adviser to the board or that his relationship to the board may have been that of attorney and client does not necessarily mean that he was a policymaking, confidential employee subject to politically motivated discharge. *Branti v. Finkel, supra,* involved assistant public defenders in a county of New York who served at the pleasure of the

public defender and who were discharged on political grounds. The district court judge held that while under *Elrod v. Burns* their discharge solely on the basis of their political affiliation would be permissible if they were the type of policymaking, confidential employee who may be discharged on that basis, the assistant public defenders did not fall within that category. Although they had broad responsibilities with respect to particular cases, they had little, if any, responsibility with respect to the overall operation of the public defenders office and made no decisions with respect to the operation of the office in which they worked. 457 *F.Supp.* 1284, 1292 (S.D.N.Y. 1978). The Court of Appeals affirmed. 598 *F.2d* 609 (2 Cir. 1979). The United States Supreme Court also affirmed, largely on the basis of *Elrod v. Burns.* But the court placed in sharper focus the concept of whether a position is one that could subject its occupant to removal or discharge on political grounds, even though the duties involve policymaking or confidentiality. The court said:

> . . . In sum, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved. [slip op. at 11]

It is our view that summary judgment was improvidently granted in this case. The movants' burden was to exclude any reasonable doubt as to the existence of any general issue of fact. *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N.J.* 67, 74 (1954). But they relied below solely on the fact that plaintiff was required to make legal decisions and exercise a certain amount of discretion in carrying out his duties to support their contention that he

was a policymaking employee. They did not endeavor to refute plaintiff's charge that he was not reappointed solely for political grounds, choosing to hold to the position that plaintiff's functions were of such nature that he was subject to discharge for any reason, including political expression. The papers submitted in support of the board's motion for summary judgment consisted merely of a one-page form appointing plaintiff to his position, a copy of Ruling No. 11, and an affidavit by the county personnel director that plaintiff was in the unclassified service of the Civil Service. There are clearly factual issues to be resolved: whether plaintiff was discharged solely for political reasons, on which plaintiff has the burden of proof; and, if he was, whether plaintiff occupied a policymaking, confidential position for the effective performance of which party affiliation is an appropriate requirement. On this issue the employer has the burden of establishing that plaintiff was subject to removal or discharge on political grounds.

Defendants' further contention is that the board could choose not to reappoint plaintiff for any reason, political or otherwise, because his appointment was for the fixed term of one year. A similar contention was rejected in *Branti.* In that case the argument was made that since an assistant public defender's term expired when the public defender's term expired, the case should be treated as involving a "failure to reappoint" rather than a dismissal and that a less stringent standard should be applied in that the assistant public defender did not have a reasonable expectation of being rehired when control of the office shifted to another political party. The court dismissed the argument summarily, stating that "[a]fter *Elrod,* it is clear that the lack of a reasonable expectation of continued employment is not sufficient to justify a dismissal based solely on

an employee's private political beliefs." ____U.S. ____ (slip opinion at p. 5, n. 6).

Thus far we have dealt with the issues only as they relate to the right of the board to refuse to reappoint plaintiff. We express no opinion on the merits of plaintiff's asserted causes of action for damages, compensatory, punitive or both, against the individual members of the board, the Union County Democratic Committee and the chairman of the committee. The committee and its chairman contend in their brief that plaintiff's claim should be dismissed because of his failure to establish their liability "under a color of state law for purposes of filing any action under State Law or 42 U.S. See [*sic*] Sections 1983, 1985 and 1986." This issue was not argued on their motion for summary judgment and was not decided by the trial judge. We decline to consider it now. *Nieder v. Royal Indemnity Ins. Co.*, 62 N.J. 229, 234 (1973).

The summary judgment is reversed and the matter is remanded for further proceedings consistent with the foregoing. We do not retain jurisdiction.

APPENDIX D

THOMAS A. BATTAGLIA, Plaintiff-Appellant, v. UNION COUNTY WELFARE BOARD, an entity of the State of New Jersey, LEDA PERSELAY, BENEDICT LAGANGA, WILLIAM MERRITT, DEBRA GREENBERG, JACOB W. KROWICKI, JR., JEFFREY W. MACCARELLI, JOANNE RAJOPPI, ANTHONY RUSSO, and ANTHONY AMALFE, all individually and as members of the Union County Welfare Board, HARRY PAPPAS, individually and as Chairman of and agent for the Union County Democratic Committee, and UNION COUNTY DEMOCRATIC COMMITTEE, an entity created by the laws of the State of New Jersey,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION- UNION COUNTY Docket No. L 47436 77 Civil Action VERIFIED COMPLAINT IN LIEU OF PEROGATIVE WRITS Copy of this pleading retained in the County Clerk's office /s/ Walter G. Halpin Clerk FILED JUL 3 1978

Plaintiff THOMAS A. BATTAGLIA, residing at 304 Huntington Road, Township of Union, County of Union, State of New Jersey, by way of complaint against defendants, says:

COUNT ONE

1. Plaintiff is a part-time employee of the defendant Union County Welfare Board. He holds the position of Legal Assistant, a position in which he functions as an attorney on behalf of the Board.

2. Defendant Union County Welfare Board is an entity established by the State of New Jersey pursuant to state statute.

3. In June, 1977, defendant Union County Welfare Board, at its regular meeting, appointed plaintiff as a Legal Assistant for a one year term to begin on or about July 5, 1977.

4. Such appointment was made in pursuance of the powers vested in defendant Union County Welfare Board.

5. Thereafter, plaintiff assumed said office and continued thereafter to occupy the same. Plaintiff performed all duties assigned to him as a Legal Assistant in a conscientious, competent and satisfactory manner.

6. Plaintiff, in his position of Legal Assistant, was a nonpolicymaking and nonconfidential employee.

7. In May and June, 1978, plaintiff made it known to the appropriate persons that he desired to remain employed by the Union County Welfare Board as a Legal Assistant.

8. On June 20, 1978, defendant Union County Welfare Board met at its regular monthly meeting. One of the items on the agenda concerned the continuing of plaintiff in his position of Legal Assistant.

9. At said meeting defendant the Union County Welfare Board refused to continue plaintiff in the position of Legal Assistant and passed a resolution purporting not to continue plaintiff in said position.

10. The refusal of defendant Union County Welfare Board to continue plaintiff in his position of Legal Assistant was based solely upon political factors and plaintiff's exercise of his constitutional rights.

11. The refusal of defendant Union County Welfare Board to continue plaintiff for said reasons is in violation of plaintiff's constitutional rights under the Constitution of the United States of America and the Constitution of the State of New Jersey, and in violation of 42 U.S.C. 1983, 42 U.S.C. 1985, 42 U.S.C. 1986 and other federal and state statutory and common law.

12. Plaintiff is rightfully entitled to continue in the position of Legal Assistant for defendant Union County Welfare Board, as defendant Union County Welfare Board had no legal power to pass the resolution referred to in paragraph 9 and to refuse to continue plaintiff in the position of Legal Assistant.

WHEREFORE, Plaintiff demands judgment against defendant Union County Welfare Board: (a) Adjudging that defendant Union County Welfare Board's refusal to continue plaintiff in his position of Legal Assistant is unlawful; (b) Directing defendant Union County Welfare Board to continue plaintiff in his position of Legal Assistant; (c) Directing defendant Union County Welfare Board to pay the costs of this action; (d) For damages, interest, costs and attorney's fees; and (e) For such relief as the court may deem appropriate.

COUNT TWO

1. Plaintiff repeats and realleges each and every allegation of Count One as if the same were set forth herein at length.

2. Defendants Leda Perselay, Benedict Laganga, William Merritt, Debra Greenberg, Jacob W. Krowicki, Jr., Jeffrey W. Maccarelli, Joanne Rajoppi, Anthony Russo and Anthony Amalfe (hereinafter referred to collec-

tively as "defendants UCWB members") are members of the Union County Welfare Board who were present at the June 20, 1978 regular board meeting.

3. Defendants UCWB members all voted and acted or failed to act in such a manner as to fail to continue plaintiff in his position of Legal Assistant to the Union County Welfare Board.

4. The refusal by defendants UCWB members to act in such a manner as to continue plaintiff in his position of Legal Assistant was based soley upon political factors and plaintiff's exercise of his constitutional rights.

5. The refusal of defendants UCWB members to continue plaintiff for said reasons is in violation of plaintiff's constitutional rights under the Constitution of the United States of America and the Constitution of the State of New Jersey, and in violation of 42 U.S.C. 1983, 42 U.S.C. 1985, 42 U.S.C. 1986 and other federal and state statutory and common law.

6. Defendants UCWB members had no legal right to act in such a manner to refuse to continue plaintiff in his position of Legal Assistant, and by so acting were acting unlawfully.

WHEREFORE, Plaintiff demands judgment against defendants Leda Perselay, Benedict Laganga, William Merritt, Debra Greenberg, Jacob W. Krowicki, Jr., Jeffrey W. Maccarelli, Joanne Rajoppi, Anthony Russo and Anthony Amalfe, both individually and as members of the Union County Welfare Board: (a) Adjudging that said defendants actions which resulted in the Union County Welfare Board's refusal to continue plaintiff in his position of Legal Assistant were unlawful; (b) Directing said defendants to take such action as is necessary to have the

Union County Welfare Board continue plaintiff in his position of Legal Assistant; (c) For damages, jointly, severally and jointly and severally, and for interest, costs, and attorneys' fees; (d) For such relief as the court may deem appropriate.

COUNT THREE

1. Plaintiff repeats and realleges each and every allegation of Counts One and Two as if the same were set forth herein at length.

2. Defendant Harry Pappas, individually and as Chairman of the Union County Democratic Committee, and defendant Union County Democratic Committee, acting through its agent Harry Pappas, did, jointly, severally, and jointly and severally, take certain actions by which they did influence defendants Union County Welfare Board and defendants UCWB members to refuse to continue plaintiff as a Legal Assistant for the Union County Welfare Board.

3. The actions of defendants Harry Pappas, in his several capacities, and defendant Union County Democratic Committee, in which defendants Union County Welfare Board and defendants UCWB members were influenced to refuse to continue plaintiff as a Legal Assistant for the Union County Welfare Board, were based solely upon political factors and plaintiff's exercise of his constitutional rights.

4. The actions by defendant Harry Pappas and defendant Union County Democratic Committee were in violation of plaintiff's constitutional rights under the Constitution of the United States of America and the Constitution of the State of New Jersey, and in violation of 42

U.S.C. 1983, 42 U.S.C. 1985, 42 U.S.C. 1986 and other federal and state statutory and common law.

WHEREFORE, Plaintiff demands judgment against defendant Harry Pappas, individually and as Chairman of the Union County Democratic Committee, and defendant Union County Democratic Committee, both jointly, severally and jointly and severally, (a) For damages, interest, costs and attorneys' fees, (b) Directing the defendants to refrain from any action designed to influence the Union County Welfare Board in deciding whether or not to continue plaintiff as a Legal Assistant for the Board, and (c) For such further relief as the court may deem appropriate.

COUNT FOUR

1. Plaintiff repeats and realleges each and every allegation of Counts one, two and three as if the same were set forth herein at length.

2. Said actions by defendants Harry Pappas and Union County Democratic Committee were consciously and intentionally done with malice, wrongful motives and a personal intent to injure plaintiff with the knowledge that grevious injury was certain to follow, and with a wanton and reckless disregard for plaintiff's rights.

WHEREFORE, Plaintiff demands judgment against defendants Harry Pappas and Union County Democratic Committee, jointly, severally and jointly and severally, for punitive damages, interest, costs and attorneys' fees.

/s/_____
THOMAS A. BATTAGLIA
Pro Se

Dated: July 3, 1978

VERIFICATION OF PLEADINGS

STATE OF NEW JERSEY)
) ss.
COUNTY OF UNION)

THOMAS A. BATTAGLIA, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am the plaintiff in the above-entitled action.

2. I have read the annexed complaint and know the contents thereof and the same are true of my own personal knowledge.

3. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/_____
THOMAS A. BATTAGLIA

Dated: July 3, 1978

AFFIDAVIT OF THOMAS BATTAGLIA

THOMAS A. BATTAGLIA, ESQ.
Pro Se
8 Mountain Avenue
Springfield, New Jersey 07081
(201) 376-3190

THOMAS A. BATTAGLIA, Plaintiff v. UNION COUNTY WELFARE BOARD, et al.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION- UNION COUNTY Docket No. CIVIL ACTION AFFIDAVIT

STATE OF NEW JERSEY)
) ss.
COUNTY OF UNION)

THOMAS A. BATTAGLIA, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am the plaintiff in the above-entitled action.

2. In June, 1977, I was appointed to a one year term as a Legal Assistant to the Union County Welfare Board.

3. I knew that my re-appointment as a Legal Assistant was to come up at the June, 1978 monthly Board meeting. The meeting was held on June 20, 1978.

4. Prior to the meeting, mostly in May, 1978, I talked with a majority of the members of the Union County

Welfare Board (hereinafter referred to as the "Board"), and they told me that I would have no difficulty being reappointed.

5. On June 19, 1978, I learned that I would have some trouble being re-appointed at the June 20 meeting. I was informed that Harry Pappas, the new Democratic County Chairman had contacted certain unidentified members of the Board concerning the June 20 meeting and my job. He suggested three names for the three positions open for reappointment; two of the names were incumbents – my name was not included.

6. I contacted Harry Pappas by telephone and I set up a meeting with him. We met for about one and one-quarter hour. Mr. Pappas admitted to me that he did not recommend my name to the Board. When I asked why, he either refused to answer or answered because I didn't. During the meeting, he spoke of his race for Chairman, my wife's and my activities during that race (they were not in favor of Mr. Pappas), the persons with whom I affiliated myself with with respect to Mr. Pappas's election as Chairman and statements made to other persons concerning Mr. Pappas with relation to his being Chairman.

7. During the meeting I requested that he submit my name to the Board; he refused to do it. I suggested that as a compromise, he might submit my name for one of the new Legal Assistant position (I am informed that the Board has created two new Legal Assistant positions, which will be filled at a special meeting on July 5, 1978.) Mr. Pappas refused. He implied that if I persisted, he would take steps to see that my wife, Victoria E. Kilkenny, would not get a job with the New Jersey state government (she is currently under consideration for a job by the state.) He suggested that I "cool my heels for six months or so" and then he

would see what he could do for me. But he stated that he needed my resume (a copy of which is in the files of the Union County Democratic Committee). When I so informed him he told me he didn't have any idea where it might be and that I should show him where in the files it was.

8. On the night of June 19, I called several members of the Board. The ones I reached all told me that Harry Pappas had called them and that he told them that I should not be re-appointed. Two persons told me that they could not vote for me because the "Party" didn't want it. One phrased his refusal by stating that it was a matter of party discipline, he had to vote the way the County Chairman (Mr. Pappas) told him. The other informed me that he had no choice as he had been told by the party that he had to vote a certain way (that is, not for me).

9. No one I spoke to even questioned my competence in performing the duties of Legal Assistant. In fact, every Board member I raised the competency issue with stated that that was not the problem in re-appointing me and that they did not question my competence.

10. It became clear to me from my conversations with the Board members and others that there was only one reason why the Board members would not vote for me: because Mr. Pappas, as Democratic County Chairman had instructed them not to so vote.

11. My conversation with Mr. Pappas made it clear to me why he would not recommend me to the Board. He objected to my political friends (my wife, Jay Bloom, who Mr. Pappas dislikes intensely, certain members of the New Democratic Coalition who did not favor Mr. Pappas for County Chairman. He also objected to my speaking to other persons prior to Mr. Pappas's election concerning

my beliefs as to whether I thought Mr. Pappas should become Chairman (I was very clear that I was not in favor of Mr. Pappas becoming chairman).

12. During the June 20 meeting, two other attorney were re-appointed with Mr. Pappas's backing. Stanley Bruder was re-appointed as Associate Counsel. Mr. Bruder is a close political friend of Walter Boright, Chairman of the Board of Freeholders. Mr. Boright endorsed Mr. Pappas for County Chairman and signed a letter which was sent to various papers for inclusion in the Letters to the Editor section. Timothy Callahan was re-appointed as a Legal Assistant. Mr. Callahan is a close political associate of David Conti, the former municipal chairman of Elizabeth. In fact, Mr. Callahan is the President of the Conti Association, an organization formed by David Conti when he ran for Mayor of Elizabeth and which is still active. Although I know of no outright expression of support for Mr. Pappas that was expressed by David Conti, it appeared to me that he was supporting Mr. Pappas for County Chairman.

13. If I am not continued in my position as a Legal Assistant to the Board, I will lose several important things. First, ' would lose the salary (about $195 gross per week). I have contacted the Unemployment office, and they were uncertain if I would qualify for unemployment benefits as the job is part-time and I self-employed as an attorney with my own practice. My family would have no income as this paycheck is the only source of income to the home. Money is needed for food, clothing and other necessities of life, and I now have a wife and two children to support. In addition I would lose certain other benefits: I and my family are covered by the medical plan provided to employees of the Board; I will have no medical insurance if I am not continued. The Board provides life insurance,

which I am told is three times the employee's annual salary (for me, about $30,000); I have no other life insurance. I contribute to the pension, and if I did not continue, I would not continue to increase my interest and work toward vesting my interest.

14. The Board would not suffer from my continuing as a Legal Assistant. They would still get the value of me services. In fact, they would obtain an attorney with one year of experience, not a brand new, inexperienced attorney.

15. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

THOMAS A. BATTAGLIA

Dated; July 3, 1978

APPENDIX E

FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced

in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Opposition

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Supreme Court, U.S.
FILED
APR 12 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1698

IN THE

Supreme Court of the United States

THOMAS A. BATTAGLIA,

Petitioner,

vs.

UNION COUNTY WELFARE BOARD, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTION PRESENTED FOR REVIEW

Has the Union County Welfare Board met its burden of proving that affiliation with a political party is an appropriate requirement for the effective performance of the office of legal assistant to the Board?

PARTIES

Petitioner-plaintiff-respondent and cross-appellant in the court below is Thomas A. Battaglia. Respondents-defendants-appellants and cross-respondents in the court below are the Union County Welfare Board, an entity of the State of New Jersey, Leda Perselay, Benedict Laganga, William Merritt, Debra Greenberg, Jacob W. Krowicki, Jr., Jeffrey W. Maccarelli, Joanne Rajoppi, Anthony Russo, and Anthony Amalfe, individually and as Members of the Union County Welfare Board, Harry Pappas, individually and as Chairman of and agent for the Union County Democratic Committee, and Union County Democratic Committee, an entity created under the laws of New Jersey.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1698

THOMAS A. BATTAGLIA,

Petitioner,

vs.

UNION COUNTY WELFARE BOARD, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Respondents Leda Perselay, Benedict Laganga, William Merritt, Debra Greenberg, Jacob W. Krowicki, Jr., Jeffrey W. Maccarelli, Joanne Rajoppi, Anthony Russo and Anthony Amalfe, as individuals, respectfully submit that this court, pursuant to *Rule 19* of the Rules of this Court, should not grant a Writ of Certiorari to the New Jersey Supreme Court, in the case of *Battaglia v. Union County Welfare Board*, 88 N.J. 48, 438 A.2d 530 (1981).

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported at 88 N.J. 48, 438 A.2d 530, set forth in Petitioner's Appendix A. The unreported opinion of the Superior Court of New Jersey, Appellate Division, dated June 16, 1980, is set forth in Petitioner's Appendix C. Respondents' motion for summary judgment was granted by the Superior Court of New Jersey, Law Division, on November 29, 1978 in an unreported, oral opinion which is set forth in Petitioner's Appendix C.

JURISDICTION

Respondents agree with Petitioner's assertion that this Court has jurisdiction to review the final judgment of the New Jersey Supreme Court pursuant to 28 U.S.C. Sec. 1257 (3).

STATEMENT OF THE CASE

Petitioner, Thomas A. Battaglia, was appointed in July, 1977 to a one year term as a Legal Assistant to the Union County Welfare Board (App. A, 2a, App. D, 50a). The duties of counsel, associate counsel and/or legal assistant to county welfare boards include the obligation to render legal opinions and give guidance on all matters affecting the Board's administration.[1] As one of four legal assistants, petitioner could be called upon at any time to perform the same duties as the Board's counsel (App. A, 15a). The attorney-client relationship between Petitioner and the Board could include the Board's confidential communications (App. A, 15a). Battaglia was not reappointed to the position of Legal Assistant (App. A, 3a). Battaglia spoke to several Board members personally concerning the question of his reappointment, and was told that he would not be reappointed because the "Party" did not want it (App. A, 2a-3a; App. D. 52a).

On July 3, 1978, Petitioner instituted an action in the Superior Court of New Jersey, Law Division, alleging violations of 42 U.S.C. 1983, 42 U.S.C. 1985, 42

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1. The Division of Public Welfare of the Department of Human Services has promulgated N.J.A.C. 10:109-2.2, which prescribes in part the duties of counsel, associate counsel and legal assistant, including the following and any such additional duties as the county welfare board might require:

i. Renders legal opinions and gives legal guidance on all matters affecting welfare board administration;

ii. Prepares all legal documents and represents the welfare board in court proceedings necessary for welfare board administration of the several public assistance programs for which the county welfare board is responsible under statute and regulations promulgated by the State Division of Public Welfare;

iii. Acts as proctor to and/or administrator of estates of deceased clients, where appropriate and necessary;

iv. Assumes responsibility for carrying through all guardianship proceedings on behalf of incompetent clients.

U.S.C. 1986 and the Constitution of the United States of America (App. D, 43a-48a). The Board's motion for Summary Judgment was granted by the Superior Court, Law Division on November 29, 1978 (App. B, 27a-34a). On Appeal to the Superior Court, Appellate Division, the Court reversed and remanded for further proceedings concerning the issue of whether Battaglia occupied a policymaking, confidential position for the effective performance of which party affiliation is an appropriate requirement[2] (App. C, 40a-41a).

On certification to the New Jersey Supreme Court, a majority of the Court reversed the Appellate Division and reaffirmed Battaglia's dismissal based upon the guidelines set forth in *Elrod* and *Branti*.[3] After reviewing the scope of duties which were attributable to Battaglia in his job as Legal Assistant, the Court noted that the policymaking and confidentiality factors were not eliminated by *Branti*, but rather could properly be elements in deciding whether party affiliation was an appropriate requirement for the effective performance of a public office (App. A, 11a). The Court held that the uncontradicted proofs established that Battaglia's duties involved both policymaking and confidentiality in matters directly related to the Union County Welfare Board, and that party affiliation was an appropriate requirement for the effective performance of the office (App. A, 18a-19a).

The dissent expressed the view that the matter should have been remanded to the trial court for a plenary hearing to determine all the facts underlying the termination of Battaglia's employment (App. A, 19a-26a).

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2. The Appellate Division relied upon the decisions of this Court in *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980) in framing the required inquiry in this manner.

3. Justice Pollock filed a dissent in which Justice Clifford joined.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The decision of the New Jersey Supreme Court in this case is completely in accord with this Court's decision in *Branti v. Finkel*, 445 U.S. 507 (1980) and represents a rational, well reasoned composite of the holdings in *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, *supra*. The court below retained the concepts of policymaking and confidentiality as potential elements of the *Branti* test of whether political affiliation is an appropriate requirement for the effective performance of a public office. The Supreme Court of New Jersey thus did not rely upon an improper standard of review, as suggested by Battaglia, but instead merely applied a proper composite of the *Elrod* and *Branti* tests to a set of uncontroverted facts.

The decision below is not in conflict with the holding of this Court in *Branti*. The attorney-client relationship between Battaglia and the Union County Welfare Board embraced confidential communication concerning policymaking or other matters that were an integral part of the Board's political philosophy. Persons entrusted with rendering legal advice on such sensitive internal policy choices, about which political groups may differ, are not insulated from dismissal on the grounds of political affiliation by *Branti*. In light of the uncontroverted facts that Battaglia's obligations as Legal Assistant were as extensive as those of the legal counsel and embraced any and all matters that might come before the Board, Respondents respectfully submit that review by this Court is unwarranted since the decision of the New Jersey Supreme Court is not in conflict with applicable decisions of this Court and in fact falls squarely within the analysis set forth in *Branti v. Finkel*, *supra*.

A. *Correct Standard of Review Applied by New Jersey Supreme Court*

Crucial to Battaglia's argument that the court below decided a federal question in a manner which conflicts with applicable decisions of this Court is the allegation that the decision below placed mistaken reliance upon the so-called *Elrod* policymaking, confidentiality test.[4] This view of the *Elrod* and *Branti* decisions as setting forth distinct if not mutually exclusive tests for determining the propriety of patronage dismissals is both misleading and inaccurate. *Branti* makes it clear that although the *ultimate* inquiry into the constitutionality of a patronage dismissal is not properly confined to an analysis of whether the person dismissed was in a policymaking or confidential position, in many cases political affiliation will be seen as an appropriate requirement for the effective performance of a public office *because* policymaking and confidentiality are an inextricable part of the job.[5]

The Court below contrasted the broad public responsibilities of Battaglia's position as Legal Assistant to the Welfare Board with those of the assistant public

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4. Battaglia advances the argument that although *Branti* reaffirmed *Elrod v. Burns*, *supra*, Branti "eschewed the policymaking-nonpolicymaking, confidential-nonconfidential distinctions drawn by the plurality and concerning opinions in *Elrod*." Petitioner's brief at 7.

5. The majority opinion by the New Jersey Supreme Court analyzes the respective holdings of this Court in *Elrod* and *Branti*, and goes on to recognize that the present state of the law represents a convergence of both decisions:

> Thus, *Branti* did not eliminate the policymaking and confidentiality factors espoused in *Elrod*. Those criteria may not be conclusive but could properly be elements in deciding whether party affiliation would probably cause an official to be ineffective in performing the duties of his office. 88 N.J. at 61, 438 A.2d at 537, App. A, 11a.

defender in *Branti*, and concluded that Battaglia's attorney-client relationship with the Board, as opposed to individual clients of the office of the Public Defender, embraced policy decisions and confidences which were directly related to the political philosophy of the Board.[6]

Battaglia's disagreement with the ultimate conclusions of the New Jersey Supreme Court is apparent, but the attempted transformation of said disagreement into an argument directed at the standard of review applied by the court below is misplaced. Respondents respectfully submit that the interpretation by the court below of the applicable decisions of this Court is proper and in no manner warrants the issuance of a writ of certiorari in this case.

B. ***Record below adequately supports the finding that political affiliation is an appropriate requirement for the position of legal assistant to the welfare board.***

A review of both the majority and dissenting opinions of the New Jersey Supreme Court reveals that Battaglia's claims of a constitutionally defective patronage dismissal are actually thinly disguised points of disagreement with the lower court's application of a set of uncontroverted facts to the legal standards established by *Elrod* and *Branti*.[7] Far from the oppressive shackling of politi-

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6. Battaglia ackowledges that (i) a Legal Assistant's prescribed duties were the same as legal counsel; (ii) the position of legal counsel involves the implementation of policy and discretionary decision making; and implicitly acknowledges that (iii) legal counsel to the Board could legitimately be required to be of the same political persuasion as the Board. 88 N.J. at 66; 438 A.2d at 539-540, App. A., 18a.

7. Neither the facts set forth in Battaglia's affidavit, attached as Petitioner's Appendix D, nor the job description of Legal Assistant to the County Welfare Board contained in N.J.A.C. 10:109-2.2, set forth in Petitioner's Appendix A, 14a-15a, were challenged by the respective parties below.

cal freedoms envisioned by the dissent, the majority opinion merely represents the conclusion that Battaglia's role as legal advisor to the Board placed him outside of the protection of *Elrod* and *Branti*. Similar conclusions have been reached in analagous cases involving the duties and responsibilities of attorneys.

The recent decision of the Third Circuit in *Ness v. Marshall*, 660 F.2d 517 (3rd. Cir. 1981), relied upon by the court below, involved attorneys who had been dismissed from the positions of city solicitor and assistant solicitor on the grounds that their political affiliation differed from that of the newly elected Democratic mayor. The Court rejected the attorneys' argument that their actual day to day responsibilities were unrelated to political matters, and instead referred to the duties described in the city's administrative code, which included rendering legal opinions to the mayor, drafting ordinances and negotiating contracts.[8] In the face of such broad, discretionary responsibilities, dismissals for political persons are not violative of First Amendment rights since a difference in party affiliation is highly likely to affect the manner in which the responsibilities of the office are carried out. See *Ness*, *supra*, at 521. See also, *Catterson v. Case*, 472 F. Supp. 833 (E.D.N.Y. 1979) (duties of county attorney analyzed in terms of city's administrative code; dismissal on grounds of political affiliation upheld); *Alfaro De Quevedo v. DeJesus Schuck*, 556 F.2d 591 (1st Cir. 1977) (reliance upon job

8. The *Ness* court noted that "In relying on an attorney to perform these functions so intimately related to city policy, the mayor has the right to receive the complete cooperation and loyalty of a trusted advisor, and should not be expected to settle for less". 660 F.2d at 522.

description rather than actual day to day responsibilities; dismissal on grounds of political affiliation upheld).[9]

Significantly, Battaglia has never challenged the fact that his position of Legal Assistant to the Welfare Board carried with it regular responsibilities which are quasi-prosecutorial in nature, such as determining which welfare fraud cases should be referred to the office of the county prosecutor for prosecution and which cases are appropriate for inclusion in the county's periodic grants of amnesty in return for restitution. The Court below correctly recognized that these types of determinations "implicate policy choices about which political groups may differ."[10]

Branti expressly left open the question of whether an attorney whose position requires the exercise of prosecutorial discretion could be dismissed on grounds of political affiliation or loyalty. This Court was careful to note that the First Amendment protection afforded the public defender in *Branti* might not necessarily extend to other positions which involve broader public responsibilities.[11]

Without question, Battaglia's position as Legal Assistant falls outside the scope of *Branti* by virtue of the wide range of potentially sensitive matters with which he had to work. Such a conclusion is entirely consistent with other post *Branti* decisions regarding the dismissals of

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9. The First Circuit noted that the relevant issue was whether the *position* itself was a policymaking one, and the extent to which the employer failed to place an extraordinary amount of trust and confidence in the plaintiff was "clearly beside the point." 556 F.2d at 593 n.4.

10. 88 N.J. at 94 n.6, 438 A.2d at 538.

11. This Court discussed the varied and discretionary responsibilities of a prosecutor in *Imbler v. Pachtman*, 424 U.S. 409 (1976).

non-ministerial public officials. See *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981) (senior citizens' coordinator exception to *Elrod* and *Branti*); *Brunton v. United States*, 518 F. Supp. 223 (S. D. Ohio 1981) (political affiliation was appropriate requirement for state directors of Farmers Home Administration).

The bonds which naturally occur between members of the same political party invariably represent common goals, strategy and policy. See *Bavoso v. Harding*, 507 F. Supp. 313 (S.D.N.Y. 1980). Where, as in the present matter, an attorney is entrusted with sensitive and confidential matters which correlate to the political philosophy of the employer, it cannot be denied that political affiliation is an appropriate and constitutionally permissible requirement for continued effectiveness in office.

CONCLUSION

For all the foregoing reasons, Respondents individual members of the Union County Welfare Board respectfully submit that this Court should not grant the writ of certiorari to the New Jersey Supreme Court.

Respectfully submitted,

/s/ Yale Manoff
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Opposition

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Supreme Court, U.S.
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APR 19
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No. 81-1698

Supreme Court of the United States

OCTOBER TERM, 1981

THOMAS A. BATTAGLIA,

Petitioner,

v.

UNION COUNTY WELFARE BOARD, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION OF RESPONDENT UNION COUNTY WELFARE BOARD

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Question Presented

Whether a public body may, for political reasons, decline to retain its legal counsel where the attorney's position is confidential in nature and involves the formulation and implementation of policy in accordance with his employer's political philosophy?

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No. 81-1698

Supreme Court of the United States

OCTOBER TERM, 1981

THOMAS A. BATTAGLIA,

Petitioner,

v.

UNION COUNTY WELFARE BOARD, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION OF RESPONDENT UNION COUNTY WELFARE BOARD

Respondent, Union County Welfare Board, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the Supreme Court of New Jersey in this case.

Opinions Below

The opinions of the Superior Court and Appellate Division are not officially reported. The opinion of the Su-

preme Court of New Jersey is officially reported at 88 N.J. 48 and 438 A.2d 530. All three opinions have been reproduced in the Appendix to the Petition for Writ of Certiorari. (1a-42a).

Jurisdiction

The ground on which the jurisdiction of this Court is invoked is stated in the Petition for Writ of Certiorari.

Statement of Facts

The Petitioner seeks review of the decision of the Supreme Court of New Jersey holding that Petitioner, an attorney for the Union County Welfare Board ("Welfare Board"), was not deprived of his First or Fourteenth Amendment rights as a result of the Welfare Board's refusal to reappoint him because of his political affiliation. The Court determined that Petitioner's position involved broad public responsibilities which were confidential in nature and involved the formulation and implementation of policy in accordance with the Welfare Board's political philosophy. The Court concluded that the effective performance of Petitioner's duties was comprised by his political beliefs. (88 N.J. at 64, 65; 438 A.2d at 538, 539).

Petitioner is an attorney-at-law of the State of New Jersey. Respondent, the Welfare Board, appointed Petitioner to the unclassified, non-tenured position of Legal Assistant, a position on the Welfare Board's legal staff. The appointment was effective for one year. When Peti-

tioner's term expired, the Welfare Board declined to reappoint him. (88 N.J. at 53, 438 A.2d at 533).

Petitioner thereafter filed a complaint against the Welfare Board, its individual members, the Union County Democratic Committee and its Chairman, seeking reappointment and compensatory damages. The complaint alleged that the refusal of the Welfare Board to reappoint him was based solely on political factors in violation of the Federal and New Jersey Constitutions as well as New Jersey statutory law. (Petitioner's Appendix, 43a-48a).

The trial court granted the Welfare Board's motion for summary judgment and dismissed the complaint. (Petitioner's Appendix, 27a-35a) On appeal, the Appellate Division reversed and remanded the matter, relying on *Elrod* v. *Burns,* 427 U.S. 347 (1976), and *Branti* v. *Finkel,* 445 U.S. 507 (1980). (Petitioner's Appendix, 36a-42a). Respondent, the Welfare Board, thereafter filed a petition for certification to the New Jersey Supreme Court and Petitioner filed a cross-petition. The Supreme Court granted the petitions (85 N.J. 485, 427 A.2d 577 (1981)), and subsequently reversed the decision of the Appellate Division.

Reasons for Denying the Writ

The Supreme Court of New Jersey held, in accordance with the guidelines enunciated in both *Elrod* and *Branti,* that Petitioner occupied a confidential attorney-client relationship with the Welfare Board. The Court found that the Welfare Board engaged in decision-making which implicated policy choices about which political groups might differ. The Court therefore concluded that the nature of

the attorney-client relationship between Petitioner and the Welfare Board was one for which political affiliation was an appropriate requirement.

It is submitted that the Petition for Writ of Certiorari should be denied because the decision of the Supreme Court of New Jersey is in complete harmony with the principles enunciated by this Court in *Elrod* and *Branti*. Moreover, there is no conflict between the decisions of state courts of last resort or among the Federal Circuit Courts of Appeals which have addressed this issue.

The Supreme Court of New Jersey Applied the Proper Standard of Review and Reached the Correct Result

In *Elrod* v. *Burns, supra,* the concurring opinion of Justices Stewart and Blackmun held* that "a non-policy-making, non-confidential government employee (may not) be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole grou d of his political beliefs." (Id. at 375).

Although the *Elrod* majority opinion had established as its premise that partisan dismissals in general infringe basic First Amendment freedoms (Id. at 357), the majority acknowledged that First Amendment protections are not absolute and concluded that persons occupying confidential or policymaking positions could be dismissed on partisan grounds without violating the Constitution. Further, this

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* When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds . . ." *Marks* v. *United States,* 430 U.S. 188, 193 (1977).

Court recognized that the political loyalty of employees is appropriate "to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." (Id. at 367).

This Court again addressed the issue of political patronage in *Branti* v. *Finkel, supra,* and held that an employee occupying a policymaking or confidential position could only be discharged for political reasons where political affiliation was an appropriate requirement for the effective performance of that office.

The Court articulated the following standard:

> "The ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." (Id. at 518).

In analyzing the duties and loyalties of an Assistant Public Defender, the majority opinion in *Branti* observed that the attorney did not represent his state employer but rather represented individual citizens who were in contro versy with the state. The Court therefore concluded that the Assistant Public Defender was not a confidential, policymaking employee. Moreover, this Court noted that "it would undermine, rather than promote, the effective performance of an Assistant Public Defender's office to make his tenure dependent on his allegiance to the dominant political party." (Id. at 519, 520).

In the instant case, the Supreme Court of New Jersey applied the *Branti* standard and concluded that the duties and responsibilities of a Legal Assistant to a County Welfare Board were strikingly different than those of the

Assistant Public Defender in *Branti.* The Court observed that a Legal Assistant:

> "i. renders legal opinions and gives legal guidance on all matters affecting welfare board administration;
>
> ii. prepares all legal documents and represents the welfare board in court proceedings when necessary for welfare board administration of the several public assistance programs for which the county welfare board is responsible under statute and regulations promulgated by the State Division of Public Welfare;
>
> iii. acts as proctor to and/or administrator of estates of deceased clients, where appropriate and necessary;
>
> iv. assumes responsibility for carrying through all guardianship proceedings on behalf of incompetent clients." (88 N.J. at 63, 64; 438 A.2d at 538, citing N.J.A.C. 10:109-2.2, adopted by the Division of Public Welfare of the Department of Human Services pursuant to N.J.S.A. 44:7-6.)

In concluding that a confidential attorney-client relationship existed between Petitioner and the Welfare Board the Court noted:

> "As distinguished from the Assistant Public Defender in *Branti,* petitioner represented the Board. His attorney-client relationship could include the Board's confidential communications. Those confidences could properly concern the policymaking or other matters that were an integral part of its political philosophy. The Board had the right to

> repose its trust and confidence in its counsel and legal assistants. Trust and confidence are the essence of the attorney-client relationship. Assuredly, a public body should not be compelled, at least in the absence of some legislative directive, to retain an attorney when those elements do not exist." (88 N.J. at 64; 438 A.2d at 538)*

Further, the Supreme Court recognized that the Welfare Board was a policymaking body and that Petitioner was involved in the formulation and implementation of that policy. The Supreme Court's analysis of Petitioner's role as a policymaker is also consistent with *Elrod*. As stated by this Court in *Elrod*, "in determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals." (Id. at 368).

The Court noted that as the Welfare Board's confidential adviser, Petitioner played a critical role in the process of establishing and implementing Welfare Board policy and was privy to and participated in discussions relating to that process. The Court cited as one example of the Welfare Board's policymaking activities its role in determining which cases would be the subject of fraud prosecutions, a role "implicating policy choices about which political groups may differ." (88 N.J. at 64, 438 A.2d at 538). The Court determined that it was appropriate for Petitioner to have a political philosophy compatible with that of the Board in view of the confiden-

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* The confidential relationship existing between an attorney and his client has long been recognized. See *Perrella* v. *Board of Education of Jersey City*, 51 N.J. 323, 331 (1968); *Hafter* v. *Farkas*, 498 F. 2d 587, 589 (2d Cir. 1974).

tial nature of the relationship and in recognition of the fact that the "subject matter of the confidence may relate to that philosophy" (88 N.J. at 65; 438 A.2d at 539).

The Court therefore concluded that the *Branti* standard had been satisfied:

> "the uncontradicted proofs . . . establish as a matter of law that the policymaking and confidential nature of the position potentially involved policymaking responsibilities and that the confidentiality of the position related directly to the public employer, the Union County Welfare Board. Thus, the legal assistant's duties were such that party affiliation was an appropriate requirement for the effective performance of the office." (88 N.J. at 67; 438 A.2d at 540).

The Supreme Court rejected Petitioner's argument that the Welfare Board's consideration of political affiliation was constitutionally impermissible because it was premised upon the desires of the County Democratic Chairman. The Court properly observed that the fundamental issue raised by Petitioner's appeal was whether political affiliation was an appropriate factor to be considered by the Welfare Board based upon this Court's opinion in *Branti*.

The Court viewed as dispositive the acknowledged fact that the failure to rehire Petitioner was based on political considerations. The Court deemed irrelevant any further consideration of the nature of the motivation surrounding Petitioner's non-retention. As the Court recognized, "it is *only* because the Welfare Board acted for a political reason that plaintiff has a First Amendment claim." (88 N.J. at 66; 438 A.2d 540).

Since the Welfare Board acknowledged that Petitioner was not rehired as its attorney because of his political affiliation, the New Jersey Supreme Court properly concluded that no purpose would be served to analyze or review the events leading to the Welfare Board's decision that Petitioner was politically unacceptable.

The New Jersey Supreme Court also rejected the attempt by Petitioner to minimize the role and policymaking authority of the Welfare Board. The fact that the policymaking authority of the Welfare Board may have been a limited one is of no moment. As the Seventh Circuit Court of Appeals recently observed in *Nekolny* v. *Painter,* 653 F. 2d 1164, 1170 (7th Cir. 1981):

> "We recognize that policymaking and policy implementation may occur at many levels, even within a particular office whose sphere of authority is narrowly circumscribed. The test is whether the position held by the individual authorizes, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation."

Thus, the Supreme Court correctly concluded that it was the *fact* of the Welfare Board's policymaking authority and not its scope that was dispositive of the issue.

Finally, Petitioner contends that the Court committed error in relying upon the provisions of N.J.A.C. 10:109-2.2 in concluding that Petitioner occupied a policymaking, confidential position. Petitoner asserts that "the Supreme Court of New Jersey impermissibly chose to speculate about the nature of Battaglia's job, rather than to rely upon the description provided in Battaglia's Verified Complaint and Affidavit." (Petition at 12, 13).

In rejecting this argument below the New Jersey Supreme Court stated:

> "The flaw in the contention is the failure to consider that the legal assistant was obligated, if called upon, to perform the duties delineated in the job's specifications." (88 N.J. at 63; 438 A.2d at 538).
>
> "The correct perspective is not only what the plaintiff as legal assistant did, but also what the duties of the position were." (88 N.J. at 64; 438 A.2d at 538).

It is submitted that the Court's analysis is consistent with *Branti* and with those decisions of the Federal Circuit Courts of Appeals and the state courts of last resort which have addressed this issue. See *Ness* v. *Marshall,* 660 F.2d 517 (3rd Cir. 1981); *Newcomb* v. *Brennan,* 558 F. 2d 825 (7th Cir., 1977), *cert. denied* 434 U.S. 968 (1978); *Alfaro De Quevedo* v. *De Jesus Schuck,* 556 F. 2d 591 (1st Cir., 1977); *Montaquila* v. *St. Cyr,* 433 A.2d 206 (R.I., 1981); see also, *Bavoso* v. *Harding,* 507 F. Supp. 313 (S.D. N.Y. 1980); *Catterson* v. *Caso,* 472 F. Supp. 833 (E.D.N.Y. 1979). Each of these decisions upheld the right of a public body to terminate an attorney for political reasons where political affiliation was found to be an appropriate requirement for the discharge of the attorney's responsibilities to his client.

The issue raised by Petitioner was directly confronted in *Ness* v. *Marshall, supra.* In that case, the attorney, a Second Assistant City Solicitor for the City of York, Pennsylvania, argued that his role was of a ministerial nature and therefore contended that political affiliation was a constitutionally impermissible factor to be considered with respect to his employment. In a unanimous opinion, the Third Circuit Court of Appeals noted that

the Administrative Code of the City of York required the attorney to assume responsibilities of a policymaking, confidential nature. The Court squarely rejected plaintiff's attempt to minimize the significance of his position. Emphasizing that the dispositive factor to be considered was what responsibilities were imposed on a City Solicitor pursuant to the Administrative Code, the Court concluded that, as a matter of law, the duties imposed on City Solicitors by the York Administrative Code "define[d] a position for which party affiliation (was) an appropriate requirement." (Id. at 522).

Similarly, in the instant case, the New Jersey Supreme Court held, as a matter of state law, that the position of Legal Assistant to a County Welfare Board is a position of a policymaking, confidential nature for which political affiliation is an appropriate requirement.

In support of his argument before this Court, Petitioner relies solely upon *Layden* v. *Costello,* 517 F.Supp. 860 (N.D.N.Y., 1981). However, the *Layden* opinion merely represents a finding that, under the factual circumstances present therein, the position held by the attorney did not require him to assume duties of a confidential, policymaking nature. (Id. at 862). Thus, the decision in *Layden* in no way detracts from the rationale of the New Jersey Supreme Court which found, as a matter of law, that the position of Legal Assistant to a County Welfare Board, pursuant to the New Jersey Administrative Code, is confidential and policymaking in nature. (88 N.J. at 67; 438 A.2d at 540).

The New Jersey Supreme Court's analysis is in complete consonance with the holdings of this Court in *Elrod* and *Branti* and is in conformity with the opinions of all

Circuit Courts of Appeals and state courts of last resort which have considered cases involving attorneys for public bodies. Consequently, this Court should deny the Petition for Writ of Certiorari to the Supreme Court of New Jersey.

CONCLUSION

For the foregoing reasons, Respondent, Union County Welfare Board, respectfully requests that this Court deny the Petition for Writ of Certiorari to the Supreme Court of New Jersey.

Respectfully submitted,

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Dated: April 15, 1982